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SOVEREIGN IMMUNITY IN A CONSTITUTIONAL GOVERNMENT: THE FEDERAL EMPLOYMENT DISCRIMINATION CASES

*Charles F. Abernathy**

Sovereign immunity: the term sounds curious in a nation that is beginning to celebrate the bicentennial of its independence from the British sovereign George III. Very early in our history we took steps to insure that the rule of law, as expressed in the Constitution, would prevail over the mortals who run our government.¹ Yet even as the concepts of rule of law and judicial review came into ascendancy, we also harbored the sovereign immunity doctrine as a restraint on judicial power and as an apparent repudiation of the rule of law. Indeed, in its most extreme form the doctrine has come to stand for judicial incapacity to redress governmental action that is known to be unconstitutional.²

The inherent antagonism between the rule of law and the sovereign immunity doctrine has produced much mischief in our courts, some of which will be considered in this Article. On its face, the very notion of judicial power *versus* "sovereign" power is an anomaly in our three-part plan of national government: the judicial branch created by article III is just as much a part of our government as the executive and legislative branches.³ In fact, "sovereign" immunity is a misnomer; for the doctrine applies only to prevent

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¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For modern analogues, see *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

² See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting).

³ U.S. CONST. arts. I, II, III. The word "sovereign" appears nowhere in the Constitution, not even in the eleventh amendment, which was passed to restore sovereign immunity for the states. See p. 330 *infra*.

suits against the executive and legislative branches; the Court has developed a separate "judicial" immunity to prevent certain suits against persons within the judicial branch.⁴

Cast in this light, sovereign immunity becomes not a mystical question of sovereign power but a practical issue of the powers and immunities of the separate branches of government. Indeed, this Article will argue that the sovereign immunity doctrine is not anticonstitutional, but rather reflects the Constitution's allocation of power among the three branches of government. The Court's development of sovereign immunity principles, as we shall see, implicitly recognizes this separation of powers rationale.

In exploring this rationale for sovereign immunity, this Article will assume a dual personality. Section I is devoted to an intensive consideration of one area of the law—employment discrimination suits against federal officers—where application of the sovereign immunity doctrine has generated considerable confusion and attendant injustice. A conventional analysis will show how the Supreme Court developed certain basic rules of sovereign immunity law, how the courts of appeals have applied these rules generally, and how the rules came to be misapplied by several courts in employment discrimination cases. The analysis in the first Section will also lay the essential case law groundwork for the more general considerations discussed in the latter two-thirds of the Article.

Sections II and III will develop the separation of powers rationale for sovereign immunity, showing how the immunity principles adopted by the Supreme Court implicitly define the decisionmaking powers of the separate branches. Section II will show how sovereign immunity considerations can enter a lawsuit at two distinct stages—in the initial pleadings and at the relief phase of the case. Section III will show how separation of powers considerations work at each of these two stages to allocate constitutional power to one branch or another. First, it discusses the traditional sovereign immunity rules that have been applied at the pleading stage and shows how they reflect separation of powers notions. Then it suggests that these same notions produce fair and effective results at the relief stage of the inquiry, the stage where courts are just now

⁴ See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) (judicial immunity); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927) (court officers); *cf.* *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1410-23 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*].

trying to fashion some coherent rationale for their decisions. A final part of Section III will bring the paper full circle. It will illustrate how the separation of powers rationale works by applying it to some of the difficult problems of relief in the area of federal employment discrimination.

I. SOVEREIGN IMMUNITY AND FEDERAL EMPLOYMENT DISCRIMINATION

A black person in Alabama has a greater chance of getting a job with George Wallace's state government than with the federal government. With blacks making up over 25 percent of the state population, only seven percent of state employees are black;⁵ in comparison, only six percent of federal employees in Alabama are black.⁶ Indeed, the federal government's performance in Alabama is so notorious that state agencies accused of racist employment practices have begun to defend themselves in court by showing that they are less discriminatory than the federal government.⁷ Nor is the federal government's record in Alabama very unusual. While the federal agencies' employment figures do not so blatantly scream discrimination elsewhere in the nation,⁸ there is reason to believe that the United States government is not the equal opportunity employer that most of us thought it to be.⁹

⁵ Complaint ¶ 42, *Penn. v. United States*, 350 F. Supp. 752 (M.D. Ala. 1972), *aff'd*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc). The hiring and promotion practices of Alabama's departments and agencies have been found to be racially discriminatory and are now under court supervision. *See NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), *aff'g* 340 F. Supp. 703 (M.D. Ala. 1972); *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

⁶ U.S. Civil Serv. Comm'n, *Minority Group Employment in the Government*, Doc. #SM 70-70B, Nov. 30, 1970 [hereinafter cited as *Minority Group Employment*]. If the Equal Employment Opportunity Commission and Veterans Administration are excluded, the federal government's figure for black employment drops to 2.5 percent. Such statistics may be used in employment suits to prove a *prima facie* case of discrimination. *See Comment, Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128, 131-35 (1973).

⁷ *See NAACP v. Allen*, 340 F. Supp. 703, 709 n.6 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974).

⁸ *See R. Rittenoure, BLACK EMPLOYMENT IN THE SOUTH: THE CASE OF THE FEDERAL GOVERNMENT* 1-2, 138-66 (1972). The author concludes that blacks are generally underrepresented in federal employment in the southern states. Though adequately represented in the federal workforce outside the south, however, black employees are confined to the lower wage schedules. *Id.* at 1-2.

⁹ *See id.* at 1-2, 138-66; *Minority Group Employment*, *supra* note 6, *passim*.

The responsibility for this dismal record can be laid directly to the inadequacy of internal administrative complaint procedures¹⁰ and the ineffectiveness of the government's internal policing effort at both the agency¹¹ and appellate level.¹² In light of the difficulties of

¹⁰ A congressional committee concluded in 1971 that the "disproportionate [*sic*] distribution of minorities and women throughout the federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

"A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of elimination of discrimination in Federal employment." H.R. Rep. No. 238, 92d Cong., 1st Sess., 23-24 (1971).

The grievance procedures are a model of bureaucratic obstructionism and delay. As originally designed, the regulations required that an aggrieved employee first approach a designated Equal Employment Opportunity (EEO) Counselor within his agency or branch. The EEO Counselor was authorized to attempt to settle the grievance informally, but should that fail, he was required to advise the employee of the employee's right to file a formal, written complaint with an EEO officer. 5 C.F.R. §§ 713.213-.214 (1971). A hearing followed, and if the employee was dissatisfied with the initial results, he faced another series of appellate reviews, both within the agency and later with the Civil Service Commission. 5 C.F.R. § 713.215 (1971).

These regulations were amended in 1972. 37 Fed. Reg. 22717 (1972). The regulations now in effect do not differ substantially from the original except that, in obedience to the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16 (Supp. III, 1973), agencies are now required to resolve a complaint within 180 days of its filing. 5 C.F.R. § 713.220 (1974).

¹¹ Agency enforcement consists largely of paper guarantees of fairness unsupported by any concern for their implementation. Although the regulations require that agency counsellors advise the aggrieved employee of his administrative rights, 5 C.F.R. § 713.213(a) (1974), this is not always done. *See Penn v. United States*, 350 F. Supp. 752 (M.D. Ala. 1972), *aff'd*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc). Moreover, enforcement personnel are put in a weak and contradictory position in relation to those whom they should police since strict enforcement might disrupt the agency and thus bring retribution from above.

¹² Dissatisfied employees may carry their appeals to the Civil Service Commission, where institutional forces also work against vigorous resolution of employee complaints. As a recent Public Interest Research Group study reports, the Commission suffers from a conflict of interest because most of its activities concern provision of management advice and support services to agency supervisors, a duty inherently incompatible with its oversight and review duties in the area of employee rights. R. Vaughn, *THE SPOILED SYSTEM* II-55 (1972). Close contact with agency heads in providing management support creates at least the appearance of partiality in deciding employee complaints, an appearance reinforced by the Commission's practice of permitting direct *ex parte* contact between hearing examiners and agency heads concerning some employee appeals. *Id.* at II-58, II-64. Even Civil Service Commission Chairman Robert Hampton remarked in 1972 that the assignment of an employee appeal function to his management oriented commission was "an anomaly." *Id.* at II-65.

obtaining relief through administrative procedures, the key to enforcing equal employment opportunities in the federal government must be the right to invoke the jurisdiction of the federal courts to ensure that discriminatory practices are ended. For over a decade, executive orders have banned invidious discrimination in federal employment,¹³ and Congress has declared that such discrimination is against federal policy.¹⁴ But more is at stake than just these policy statements—the policy is grounded in the anti-discrimination provisions of the Constitution itself.¹⁵ Thus the courts, in their role as protectors of individual constitutional rights,¹⁶ are brought into the fray.

Yet several federal courts of appeals, covering states where

¹³ See, e.g., Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), as amended by Exec. Order No. 11590, 36 Fed. Reg. 7831 (1971).

¹⁴ 5 U.S.C. § 7151 (1970) provides: "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin."

¹⁵ Early cases sometimes noted that the Constitution contained no equal protection clause applicable to the federal government as the fourteenth amendment's clause applied to the states. See, e.g., *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921). Yet over the last quarter-century the Supreme Court has found such nondiscrimination principles to be implicit in our governmental system. Racial discrimination was declared by the Court to be against federal public policy in *Hurd v. Hodge*, 334 U.S. 24 (1948), and the ban on federal racial discrimination has since 1954 been read into the fifth amendment's due process clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). While *Bolling* and later cases used language that suggested that perhaps only egregious cases of discrimination were covered by the fifth amendment's due process clause, see, e.g., *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (discrimination "so unjustifiable" as to violate due process covered), in practice the Court's mode of analysis has been identical in both federal and state discrimination cases. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969) (claims arising in the District of Columbia under the due process clause and in several states subject to the equal protection clause disposed of in same manner). Compare *Frontiero v. Richardson*, 411 U.S. 677 (1973), with *Reed v. Reed*, 404 U.S. 71 (1971). Even the arguably limiting language has been dropped in recent cases. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). See also *Jackson v. Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974). The antidiscrimination principles of the fifth amendment apply to the full range of federal governmental activities, including employment discrimination by federal departments and agencies. See *Schlesinger v. Ballard*, 95 S. Ct. 572 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973). (The type of discrimination at issue, e.g., sex, race, would relate only to the standard of court review, just as in state equal protection cases, and not to the issue of coverage itself. See *Frontiero v. Richardson*, *supra*, at 682.)

¹⁶ See note 29 *infra*.

federal employment discrimination is greatest,¹⁷ have held that sovereign immunity prevented them from banning employment discrimination by federal officials. The first such case, *Gnotta v. United States*,¹⁸ was a suit by a federal civil service employee who claimed that his immediate supervisor had denied him advancement and supplemental job training because of his Italian ancestry. Such discrimination based on alienage is patently unconstitutional,¹⁹ but in an opinion written by Judge (now Justice) Blackmun, an Eighth Circuit panel ruled that Gnotta's suit was barred by the doctrine of sovereign immunity. Fifth²⁰ and Sixth²¹ Circuit cases have followed this position and have applied the doctrine to bar suits in which black federal employees claimed that they had been fired or denied promotion solely on the basis of their race. While recent decisions from the Fifth²² and Ninth Circuits²³ have tried to open the door to at least partial relief, they leave much of the immunity defense intact.²⁴ More importantly, even these modifications of the *Gnotta* position show a continuing misunderstanding of the immunity doctrine, a misunderstanding that perpetuates confusion and injustice.

The impact of the sovereign immunity defense continues to be felt in the federal employment sector despite the passage of the 1972 Equal Employment Opportunity Act, which waives the sovereign immunity defense in part.²⁵ Many claims only now being litigated arose before the Act's effective date,²⁶ and, more importantly, the

¹⁷ Cf. note 8 *supra*. The major southern states lie in the following circuits: Fourth (Virginia, North Carolina, South Carolina), Fifth (Georgia, Florida, Alabama, Mississippi, Louisiana, Texas), Sixth (Tennessee, and border state Kentucky), and Eighth (Arkansas and border state Missouri). The case developments discussed in this Article have reached each of these circuits except the Fourth.

¹⁸ 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970).

¹⁹ See *Oyama v. California*, 332 U.S. 633 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); cf. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (holding the same rule to apply to the United States as to a state).

²⁰ *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971).

²¹ *Bramblett v. Desobry*, 490 F.2d 405 (6th Cir.), *cert. denied*, 95 S. Ct. 133 (1974); *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971). See *Place v. Weinberger*, 497 F.2d 412 (6th Cir.), *cert. denied*, 95 S. Ct. 526 (1974) (sex discrimination).

²² *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972).

²³ *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974). The court relied upon the Fifth Circuit decision in *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972).

²⁴ See pp. 341-43 *infra*.

²⁵ 42 U.S.C. § 2000e-16(c) (Supp. III, 1973).

²⁶ See, e.g., *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Place v. Weinberger*, 497 F.2d 412 (6th Cir.), *cert. denied*, 95 S. Ct. 526 (1974); *Bramblett v. Desobry*, 490 F.2d 405 (6th Cir.), *cert. denied*, 95 S. Ct. 133 (1974). The latter two cases

1972 Act does not waive immunity for all agencies and departments²⁷ nor does it cover all types of discrimination.²⁸ Thus, many federal employment suits will be brought without benefit of the partial statutory waiver of immunity, and plaintiffs in these cases must depend for the success of their claims²⁹ upon court reversal of the *Gnotta*-type precedents.

Nor does the impact of *Gnotta* stop with employment cases or federal defendants. The sovereign immunity doctrine can be applied

held that the 1972 Equal Employment Opportunity Act is not retroactive, thus leaving in place for a time the sovereign immunity bar that the Sixth Circuit had adopted before the act's passage. See *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971). The Fourth Circuit, however, has granted some relief to plaintiffs whose claims predated the waiver statute, ruling that the statute applies retroactively to cover at least those claims that were already in the administrative complaint process on the effective date of the 1972 Act. See *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974).

²⁷ See 42 U.S.C. § 2000e-16(a) (Supp. III, 1973).

²⁸ Only certain kinds of discrimination are prohibited; see 42 U.S.C. § 2000e-16(a) (Supp. III, 1973) (race, color, religion, sex, national origin). While the areas in which immunity is waived cover most traditional bases for discrimination, some currently important bases that might be unconstitutional are not named, e.g., alien status, see *Mow Sun Wong v. Hampton*, 500 F.2d 1031 (9th Cir. 1974), cert. granted, 417 U.S. 944 (1974); marital status, compare *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); Indian tribal status, see *Morton v. Mancari*, 417 U.S. 535 (1974); illegitimacy, cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); and sexual orientation and status related to sex (e.g., pregnancy), cf. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

²⁹ The question may arise whether claims pursued outside the Equal Employment Opportunity Act of 1972 state a cause of action since that statute not only waives sovereign immunity in part but also specifically provides a cause of action for the aggrieved employee. See 42 U.S.C. § 2000e-16(c) (Supp. III, 1973). This issue, however, presents no real problem, as causes of action for unconstitutional deprivations are implied directly from the Constitution itself, at least where injunctive relief is the remedy sought. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913). The rule is also implicit in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), where the Court found no cause of action under 42 U.S.C. § 1983 (1970) and consequently no jurisdiction under 28 U.S.C. § 1343(3) (1970). Rather than dismiss the complaint, the Court remanded for a determination of whether jurisdiction existed under 28 U.S.C. § 1331 (1970), *id.* at 515, a remand that would have been fruitless unless the Court considered there to be an independent cause of action stated directly under the Constitution. See *The Supreme Court: 1972 Term*, 87 HARV. L. REV. 252, 261-62 & nn. 53, 55 (1973).

Plaintiffs claiming racial discrimination can also base their cause of action on the statutory authority of 42 U.S.C. § 1981 (1970). See note 121 *infra*. See *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Penn v. Schlesinger*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc); cf. *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) (involving § 1982, companion provision to § 1981, and holding federal action covered).

by analogy to suits in any subject matter area,³⁰ and since government attorneys as a matter of course plead sovereign immunity in almost every case against federal officials,³¹ there is every opportunity for the doctrine to creep into the full range of such suits.³² Moreover, because the doctrine of sovereign immunity is applied identically to the states and the federal government,³³ the *Gnotta* ruling could apply with equal vigor to *state* action which violated constitutional commands.³⁴

With these implications in mind, we can now turn to a brief review of the historical development of federal sovereign immunity doctrine to provide a basis for analyzing the doctrine in the employment discrimination context.

A. Rise and Restriction of Sovereign Immunity Doctrine

1. Supreme Court Development of the Doctrine and its Exceptions

Sovereign immunity doctrine has been a source of much legal controversy.³⁵ Often regarded as part of our English legal heritage,³⁶

³⁰ For example, in *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971), the court suggested that even *Bolling v. Sharpe*, 347 U.S. 497 (1954), which mandated school integration in the District of Columbia, would have been decided contrarily had the Court considered the sovereign immunity issue.

³¹ See Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 420 n.152 (1970).

³² See pp. 335-36 *infra*.

³³ U.S. CONST. amend XI. *But see* pp. 331-32 *infra*.

³⁴ *Cf. Edelman v. Jordan*, 415 U.S. 651 (1974) (holding a federal court's award of retroactive welfare benefits barred by the eleventh amendment). One recent certiorari petition has claimed that a federal court's affirmative order of injunctive relief against defendant state officials violates the eleventh amendment. *Petition for Certiorari, Crisler v. Morrow*, No. 73-1838, 43 U.S.L.W. 3054 (U.S. Aug. 13, 1974), *petitioning for cert. to* 491 F.2d 1053 (5th Cir. 1974).

³⁵ Commentators have often complained of the injustices the doctrine produces and argued for legislative abolition. See, e.g., Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919); Cramton, *supra* note 31; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924), or for judicial reform of the doctrine, see Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 CORNELL L.Q. 3 (1954); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

³⁶ See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-19 (1963); *cf. THE FEDERALIST* No. 81 (A. Hamilton). Professor Jaffe suggests that we have bastardized the English doctrine by emphasizing its strict theory rather than its lenient practice. He argues that the English practice

the doctrine has been an important political issue since soon after the Republic was founded. The Supreme Court, sitting in only its second term, refused to insulate a state from judgment in *Chisholm v. Georgia*.³⁷ That decision, however, was overridden by adoption in 1798 of the eleventh amendment, which proclaimed sovereign immunity in suits against a state.³⁸ Apparently chastised, the Court later extended the immunity by judicial fiat to the federal government as well.³⁹ Later courts ingenuously repeated the bald proposition that "no government has ever held itself liable to individuals for the misfeasance . . . of its officers,"⁴⁰ ignoring that the opposite doctrine was applied in almost every western European country.⁴¹ Appropriately, the first Supreme Court opinion holding that the federal government enjoyed sovereign immunity cited no authority and gave no reason for the doctrine's adoption.⁴²

Although the Court embraced federal sovereign immunity with no analysis, it has sought with much deliberation to limit the doctrine's application. In the first case to analyze the issue comprehensively, *United States v. Lee*,⁴³ a descendant of General Robert E. Lee sued to recover his estate, which had been seized by

makes one wonder "whether as a practical matter [sovereign immunity] ever has existed. From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course," Jaffe, *supra*, at 1. He notes that English theory rather than practice was adopted in America at least in part because the states feared being sued on their debts. *Id.* at 19 & n.57.

³⁷ 2 U.S. (2 Dall.) 419 (1793).

³⁸ The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The wording of the amendment, curiously, has been read both narrowly and broadly by the Court. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (reading the amendment also to bar suits by the citizens of the same state); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Clark v. Barnard*, 108 U.S. 436 (1883) (immunity may be impliedly waived).

³⁹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (dictum).

⁴⁰ *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274 (1868).

⁴¹ See Borchard, *supra* note 35, at 1, 2, 8 n. 24.

⁴² *United States v. McLemore*, 45 U.S. (4 How.) 286, 287-88 (1846). Wide attention had been given to the concept of state sovereign immunity, however. See THE FEDERALIST No. 81 (A. Hamilton).

⁴³ 106 U.S. 196 (1882). Judgment had been rendered in the circuit court, where the United States was not a party, against individual federal officials. The United States filed an appeal *eo nomine*. *Id.* at 196-97.

federal soldiers and converted into Arlington cemetery. It was admitted that, if authorized, the seizure would have been unconstitutional because no compensation was paid.⁴⁴ In a five-to-four decision the Court held that sovereign immunity was no bar to determining the case because the officers had acted outside their constitutional authority.⁴⁵

This analysis, after several false starts,⁴⁶ was later applied to enforce the Reconstruction amendments against states that claimed themselves protected from suit by the eleventh amendment. Giving full force to ideas that lurked beneath the surface of the *Lee* opinion, the Court reasoned in *Ex parte Young*⁴⁷ that a state law that is unconstitutional is no law at all, and "the officer in proceeding under such enactment comes into conflict with the superior authority of [the] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."⁴⁸

Sovereign immunity doctrine has fluctuated somewhat since the *Lee* and *Young* decisions,⁴⁹ but the exception there recognized has remained the principal standard for removing the immunity bar. The two parallel lines of decision on state and federal sovereign immunity deviated for a time during the early twentieth century when the Court expressed a willingness to hear cases where the federal officials'

⁴⁴ *Id.* at 219-20. The federal Court of Claims had not yet been created when *Lee* was decided. Although the doctrine developed in *Lee* has remained important, the Court has applied the rules differently to land cases now that a remedy in the Court of Claims is available. See *Malone v. Bowdoin*, 369 U.S. 643, 646-48 (1962).

⁴⁵ 106 U.S. at 218-19 & *passim*. A variety of other grounds were suggested, most of them resting on historical analysis.

⁴⁶ See generally C. Wright, *FEDERAL COURTS* 183-86 (2d ed. 1970).

⁴⁷ 209 U.S. 123 (1908).

⁴⁸ *Id.* at 159-60. The Court might have chosen to harmonize the direct conflict between the eleventh and fourteenth amendments, but it avoided that issue. Cf. Case Note, 50 HARV. L. REV. 56 (1937). It is the purpose of this Section to give a brief overview of the development of sovereign immunity principles rather than to describe the underlying factors that motivated constitutional decisionmaking. Nevertheless, it should be noted here that the conflict in *Young* between the eleventh and fourteenth amendments is a contest between the Court's institutional power to decide constitutional questions, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and those state forces that wish to insulate their activities from such review, see *Cooper v. Aaron*, 358 U.S. 1 (1958). In this light, the *Young* holding becomes a reaffirmation of the Court's power to decide the underlying constitutional issue, and the label sovereign immunity is applied whenever the Court decides that the state defendants have not acted unconstitutionally.

⁴⁹ See Davis, *supra* note 35, at 3-8.

challenged action was not unconstitutional or ultra vires but simply illegal under general law,⁵⁰ but these federal cases were later overruled or distinguished, and the doctrines applied to the states and the federal government came closely together again in *Larson v. Domestic and Foreign Commerce Corp.*⁵¹

In *Larson* the plaintiff corporation had entered into a contract with the War Assets Administration, a federal agency, for the delivery of coal. When the corporation failed to deposit funds in advance payment, as the agency deemed to be required by the contract,⁵² the government cancelled the contract. The corporation then commenced its suit asking that the contract be declared binding and that Larson, as the agency's administrator, be enjoined from selling or delivering the coal to any other buyer. Larson invoked the doctrine of sovereign immunity in an attempt to bar the suit.⁵³

The Court⁵⁴ proceeded to discuss the sovereign immunity issue in a two-step analysis. First, the Court followed long-accepted holdings⁵⁵ in ruling that the suit, though nominally against an individual, is actually one against the United States if the request for relief would run against the government's property or funds or would affect the officer in the exercise of his official functions.⁵⁶ This part of

⁵⁰ See, e.g., *Goltra v. Weeks*, 271 U.S. 536 (1926), criticized in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 699-702 (1949). Insofar as *Goltra* may have embodied some respect for state or general law as controlling the federal government, cf. HART & WECHSLER, *supra* note 4, at 935 (¶ 5), those ideas have been eroded by more recent developments that recognize the need for the federal bureaucracy to act without undue hindrance in attending to problems of a national nature. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947) (preemption notions).

⁵¹ 337 U.S. 682 (1949).

⁵² The corporation had posted a letter of credit instead of the equivalent amount in cash. *Id.* at 685.

⁵³ *Id.* at 684-86.

⁵⁴ Some commentators have remarked that the *Larson* opinion, so often relied upon, was only a minority position. See, e.g., Cramton, *supra* note 31, at 405 n.73. Chief Justice Vinson's opinion, however, is clearly labeled that "of the Court," and Justice Douglas' short concurring statement plainly declares that "I have joined the Court's opinion." 337 U.S. at 705. Justice Rutledge concurred only in the result, while Justices Jackson, Frankfurter, and Burton dissented.

⁵⁵ The Court cited *In re Ayers*, 123 U.S. 443 (1887), and *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). 337 U.S. at 687 n.6.

⁵⁶ 337 U.S. at 687-88. This is the so-called "general rule." Cramton, *supra* note 31, at 416.

the inquiry is little more than a perfunctory question. Because the government can act only through its officers and agents,⁵⁷ virtually every action against an officer will be in effect a suit against the sovereign. Only when the plaintiff requests damages from an individual defendant⁵⁸ or when the suit is against the person for activities totally extraneous from his official duties⁵⁹ is the government not implicated.

The second prong of the Court's analysis carved two major exceptions to the first test. Even if the initial inquiry indicates that the immunity doctrine should apply, said the Court, the suit still does not involve the sovereign if the officer's official actions were not those sanctioned by the government, that is, if his actions exceeded his authority or if they violated the Constitution. In such situations the "officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden."⁶⁰ Although the Court chose words which carry the quaint ring of agency law, the phrasing suggests real considerations. The government cares only that legally and constitutionally mandated activities are carried out. When a court enjoins official actions that are ultra vires or unconstitutional, there is no interference with legitimate governmental operations.⁶¹

Applying this analysis to the case before it, the *Larson* Court found that the suit should properly be characterized as one against the United States since a decree would affect the War Assets Administration's coal delivery program.⁶² The Court further held that the exceptions to the rule did not apply because the corporate buyers had not alleged that Larson's actions in revoking the contract

⁵⁷ Cramton, *supra* note 31, at 410-11; but see *Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9th Cir. 1971).

⁵⁸ See, e.g. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961). Only law enforcement officers and other low-level officials appear to bear the burden of their individual misconduct. Higher officials are usually protected by a judicially created "official immunity." See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor); *Barr v. Mateo*, 360 U.S. 564 (1959); *Sittenfield v. Tobringer*, 459 F.2d 1137 (D.C. Cir. 1972) (zoning officials).

⁵⁹ The *Larson* Court suggested as an example an officer's sale of his personal home. 337 U.S. at 689.

⁶⁰ 337 U.S. at 689.

⁶¹ *Id.* at 689-90. Protection from undue interference with government funds and operations is the only basis for the immunity doctrine that is still seriously urged. See *id.* at 704; *Block*, *supra* note 35, at 1061; cf. pp. 360-63 *infra*.

⁶² 337 U.S. at 703.

were unconstitutional or ultra vires.⁶³ The plaintiffs argued that official action that was illegal under general law also warranted an exception to the sovereign immunity doctrine, but this contention was pointedly rejected.⁶⁴ Attempting to wipe out all prior ambiguities in the law, the Court tortuously reinterpreted most of its prior decisions to fit them into the categories of ultra vires or unconstitutional action.⁶⁵ Cases not admitting such a reading were disapproved.⁶⁶ The finely drawn line between mere illegality and ultra vires actions left a foreboding flaw to which we shall soon return.⁶⁷

The *Larson* ruling quickly took hold. Only five years after the decision, Professor Davis was able to state that the *Larson* exceptions were the "outstanding generalization" dominating the case law of sovereign immunity.⁶⁸ Since 1949 the Court has only twice given full consideration to the federal sovereign immunity issue, and each time it unanimously reaffirmed the approach adopted by a bare five-member majority in *Larson*.⁶⁹ Justice Clark's opinion for the Court in *Dugan v. Rank*⁷⁰ sets out the rules most succinctly. After noting that the sovereign immunity doctrine applies when the suit against an officer is in reality against the government, he reiterates that there are exceptions:

Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of

⁶³ *Id.* at 691, 703. Sovereign immunity may be waived by statute, *Canadian Aviator v. United States*, 324 U.S. 215 (1945), and the Court suggested that the corporation's remedy against the government could be pursued under such a statutory waiver in the Court of Claims. 337 U.S. at 703 n.27.

⁶⁴ 337 U.S. at 692, 699-702. The plaintiff's argument was that official action constituting a common law tort was "illegal" as a matter of general law, would not be authorized by statute, and thus could not be shielded by sovereign immunity. *See* p. 332 and note 56 *supra*.

⁶⁵ 337 U.S. at 693-700. On whether the rereadings were labored, see Justice Frankfurter's dissenting opinion, 337 U.S. at 716-32.

⁶⁶ *Id.* at 699-702. *Goltra v. Weeks*, 271 U.S. 536 (1926) was the only case specifically disapproved, but there were undoubtedly others. *See* 337 U.S. at 716-32 (Frankfurter, J., dissenting).

⁶⁷ *See* pp. 340-41 *infra*.

⁶⁸ Davis, *supra* note 35, at 8.

⁶⁹ *See* *Dugan v. Rank*, 372 U.S. 609 (1963) and its companion case, *City of Fresno v. California*, 372 U.S. 627 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). In 1963, the Court filed a two-paragraph per curiam order which dismissed an action in its original jurisdiction without discussing the *Larson-Dugan* exceptions. *Hawaii v. Gordon*, 373 U.S. 57 (1963). *Cf.* *Georgia R.R. and Banking Co. v. Redwine*, 342 U.S. 299 (1952) (eleventh amendment).

⁷⁰ 372 U.S. 609 (1963).

their authority, the powers themselves or the manner in which they are exercised are constitutionally void In either of such cases the officer's action "can be made the basis of a suit for specific relief against the officer as an individual" ⁷¹

2. Recent Cases in the Courts of Appeals

The very settled nature of the *Larson-Dugan* exceptions to sovereign immunity is illustrated by the great number of recent Court of Appeals decisions outside the employment area where the courts have found little difficulty in applying the Supreme Court's standards. A survey of the 28 instances since 1969⁷² in which federal sovereign immunity was considered shows 18 suits in which the *Larson-Dugan* formulations were noted⁷³ and the defense of immunity overruled.⁷⁴ The suits ranged from attempts to stop a

⁷¹ *Id.* at 621-33. The Court has not always pressed the technical requirement that the official be sued in his personal capacity. *See, e.g.,* *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 n.8 (1949); *Perkins v. Elg*, 307 U.S. 325, 349 (1939).

⁷² The period surveyed covers those cases decided since 1969, the year in which sovereign immunity was first applied to bar federal employment discrimination cases. *See* note 20 *supra*. Those cases in which courts found a statutory waiver of immunity, *e.g.,* *Romeo v. United States*, 462 F.2d 1036 (5th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973), or proceeded to the merits and dismissed on the merits rather than on sovereign immunity grounds, *e.g.,* *Reece v. United States*, 455 F.2d 240 (9th Cir. 1972) have been excluded.

⁷³ We are not here concerned with whether the *Larson-Dugan* principles were correctly applied in the circumstances of each case, but only with whether the courts understood what principles they were to use in deciding sovereign immunity cases.

⁷⁴ Eight cases find that the doctrine did not apply because the officer's acts were unconstitutional. *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1150-51 (4th Cir. 1974); *Leonhard v. Mitchell*, 473 F.2d 709, 712 (2d Cir. 1973), *cert. denied*, 412 U.S. 949 (1974); *Richardson v. United States*, 465 F.2d 844 (3rd Cir. 1972) (en banc), *cert. denied*, 410 U.S. 955 (1973) (in suit to require disclosure of CIA funding, no sovereign immunity because alleged failure to disclose violates article I, § 9 of the Constitution); *Gautreaux v. Romney*, 448 F.2d 731, 735 (7th Cir. 1971); *Williams v. Eaton*, 443 F.2d 422, 428-29 (10th Cir. 1971); *Menard v. Mitchell*, 430 F.2d 486, 493 n.36 (D.C. Cir. 1970) (per Bazelon, C.J.) (no sovereign immunity where defendant had acted unconstitutionally and without authority in keeping fingerprints of innocent individuals in FBI files); *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971); *National Ass'n of Gov't Employees v. White*, 418 F.2d 1126, 1129-30 (D.C. Cir. 1969) (panel including Judge, now Chief Justice, Burger).

Ten cases hold that the officers exceeded their authority. *See* *Schlaflly v. Volpe*, 495 F.2d 273, 277-78 (7th Cir. 1974); *Association of N.W. Steelheaders v. United*

racially discriminatory federal housing program⁷⁵ to a test of the constitutionality of the Vietnam War.⁷⁶ In the other ten cases decided since 1969, the *Larson-Dugan* exceptions were noted but held inapplicable. In each of these decisions the Court ruled that the federal official had acted within the scope of his authority and that the action was not unconstitutional.⁷⁷

During this period, however, courts faced with federal employment discrimination claims failed to apply the *Larson-Dugan* exceptions in considering the sovereign immunity defense.⁷⁸ Each of these cases involved racial or ethnic discrimination which is unquestionably unconstitutional,⁷⁹ and yet in each case the court ruled in favor of at least partial sovereign immunity. We turn to those cases to find out what went wrong.

States Army Corps of Engineers, 485 F.2d 67, 69 (9th Cir. 1973); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973); *National Helium Corp. v. Morton*, 455 F.2d 650, 654-55 (10th Cir. 1971); *Rockbridge v. Lincoln*, 449 F.2d 567, 573-74 (9th Cir. 1971); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1052-53 (D.C. Cir. 1971); *American Bible Society v. Blount*, 446 F.2d 588, 596-98 (3rd Cir. 1971); *Armstrong v. Udall*, 435 F.2d 38, 40 (9th Cir. 1970); *Andros v. Rupp*, 433 F.2d 70, 72-73 (9th Cir. 1970); *Washington v. Udall*, 417 F.2d 1310, 1313-16 (9th Cir. 1969).

⁷⁵ *Gautreaux v. Romney*, 448 F.2d 731, 735 (7th Cir. 1971).

⁷⁶ *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971). The court ruled that although the claim may be nonjusticiable, sovereign immunity did not apply because the plaintiff alleged that the war was unconstitutional. *Id.* at 306.

⁷⁷ *See Essex v. Vinal*, 499 F.2d 226, 229 (8th Cir. 1974) (acceptance of taxes held "illegal" but not ultra vires; therefore, remedy in court of claims); *Junior Chamber of Commerce v. U.S. Jaycees*, 495 F.2d 883, 889 (10th Cir. 1974) (tax officials acting within authority and not unconstitutionally in granting tax exemption); *National Helium Corp. v. Morton*, 486 F.2d 995, 1000 (10th Cir. 1973); *National Indian Youth Council v. Bruce*, 485 F.2d 97, 99 (10th Cir. 1973), *cert. denied*, 415 U.S. 946 (1974) (Bureau of Indian Affairs said to be acting within discretion in operating all-Indian Schools); *Sierra Club v. Hickel*, 467 F.2d 1048, 1051-54 (6th Cir. 1972), *cert. denied*, 411 U.S. 920 (1974); *McQueary v. Laird*, 449 F.2d 608, 610 (10th Cir. 1971) (storage of chemical warfare materials at Rocky Mountain Arsenal authorized by law); *Scholder v. United States*, 428 F.2d 1123, 1130 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970); *Colson v. Hickel*, 428 F.2d 1046, 1051 (5th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *Blake Constr. Co. v. American Vocational Ass'n Inc.*, 419 F.2d 308, 312-13 (D.C. Cir. 1969); *cf. Knight v. New York*, 443 F.2d 415, 419-21 (2d Cir. 1971) (*Larson-Dugan* rules in eleventh amendment context).

⁷⁸ *See p. 327 supra*. Additionally, one maverick Fourth Circuit decision ruled out the defense simply because it felt that judgment against the United States would have insignificant impact on the government. *See Littell v. Morton*, 445 F.2d 1207, 1214 (4th Cir. 1971).

⁷⁹ *See cases cited in notes 15 & 19 supra*.

B. Federal Employment Discrimination Cases

Those federal employment cases recognizing an expanded sovereign immunity defense may be traced back to a common origin, Judge (now Justice) Blackmun's opinion for the Eighth Circuit in *Gnotta v. United States*.⁸⁰ In that case a federal civil servant sued his supervisor and others, alleging that they had denied him advanced training and job promotion solely because of his Italian ancestry. Although such discrimination in this context was certainly unconstitutional⁸¹ and demanded application of the *Larson-Dugan* exceptions, the court nevertheless ruled that sovereign immunity barred Gnotta's suit.

Although the *Gnotta* opinion has been in circulation for only five years, it has attracted two very important adherents. In *Ogletree v. McNamara*⁸² the Sixth Circuit briefly adverted to *Gnotta* and then found that sovereign immunity barred black civilian employees' claims that the Air Force's hiring, promotion, and complaint procedures were unconstitutionally discriminatory.⁸³ The Fifth Circuit, in *Blaze v. Moon*,⁸⁴ dismissed on sovereign immunity grounds a federal employee's suit alleging unconstitutional racial discrimination in hiring by the Corps of Engineers.⁸⁵ The Fifth Circuit

⁸⁰ 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970).

⁸¹ See note 19 *supra*. Such discrimination could be justified only upon a showing of a compelling governmental interest in maintaining the discrimination. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Hirabayashi v. United States*, 320 U.S. 81 (1943). There is no intimation in the *Gnotta* opinion that the plaintiff's position involved national security or that the government had any particular interest which has been suggested as compelling in other contexts. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Hirabayashi v. United States*, *supra*; *cf. Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*).

⁸² 449 F.2d 93, 99 (6th Cir. 1971).

⁸³ The Sixth Circuit later faced two additional cases in which it invoked sovereign immunity to bar federal employment suits. See *Place v. Weinberger*, 497 F.2d 412 (6th Cir.), *cert. denied*, 95 S. Ct. 526 (1974); *Bramblett v. Desobry*, 490 F.2d 405 (6th Cir.), *cert. denied*, 95 S. Ct. 133 (1974). It is unclear from the *Bramblett* opinion whether the employee's discharge was merely arbitrary or unconstitutional; the *Larson-Dugan* exceptions would apply only in the latter situation. In any event, the court's cursory dismissal of the case without any inquiry into the scope of the officer's authority or the constitutionality of his action shows a continuing misunderstanding of sovereign immunity principles.

⁸⁴ 440 F.2d 1348 (5th Cir. 1971).

⁸⁵ *Blaze* charged that the agency hired blacks in part-time and unclassified positions while hiring whites for high paying jobs. While one set of Justice Department attorneys in the South was arguing that such practices could not be challenged due to the sovereign immunity doctrine, another set of government attorneys was

also followed *Gnotta* in *Beale v. Blount*,⁸⁶ but here the court began to limit its obedience. Although a fired postal employee's request for an injunction encountered the immunity obstacle, the panel decided that relief in the nature of mandamus was a proper exception to the doctrine.⁸⁷

The *Ogletree* and *Blaze* opinions merely adopted the *Gnotta* holding without examination and therefore add little to its analysis. *Beale v. Blount*, however, began to retreat from absolute immunity, and its attempt to limit the *Gnotta* rationale has attracted support from the Ninth Circuit.⁸⁸ A comparison of *Beale* and *Gnotta* will illustrate how the courts' analytical problems began and how they are beginning to solve those problems.

I. *Gnotta v. United States*⁸⁹

Judge Blackmun's opinion in *Gnotta* is no model of clarity. Discussing the merits of the case at the outset but turning to the sovereign immunity issue when the merits begin to show difficulty, his writing leaves somewhat unclear whether he considers *Gnotta*'s charge of discrimination to be unfounded or simply irrelevant to the immunity issue.⁹⁰ A charitable reading of the opinion might characterize the case as one where ethnic discrimination was claimed but not proved.⁹¹

prosecuting the state of Alabama for having followed similar practices in its hiring and promotion. See *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

⁸⁶ 461 F.2d 1133 (5th Cir. 1972).

⁸⁷ *Beale* required, however, that the plaintiff exhaust administrative remedies as a prerequisite to the mandamus action. 461 F.2d at 1138-40. The *Beale* trend away from a strict *Gnotta*-type view of sovereign immunity was followed and expanded in *Penn v. Schlesinger*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), which was in turn cited and followed in *Petterway v. Veteran's Adm'n Hosp.*, 495 F.2d 1223 (5th Cir. 1974). See p. 344 *infra*. *Penn's* reversal en banc has cast a cloud on its more enlightened holding, and therefore upon *Petterway* as well. Although the *Penn* reversal was technically for failure to exhaust remedies, the issues which apparently concerned the Court closely parallel sovereign immunity considerations—namely the respect for executive discretion in hiring and promotion of employees. Cf. *Ogletree v. McNamara*, 449 F.2d 93 (6th Cir. 1971).

⁸⁸ See *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974).

⁸⁹ 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970).

⁹⁰ 415 F.2d at 1274-75.

⁹¹ The record showed that Mr. *Gnotta* had carried his claim through administrative appeals and that each level had ruled against his claim, including the Civil Service Commission. 415 F.2d at 1275. "One is inclined," wrote Judge Blackmun, "initially and on the face of plaintiff *Gnotta's* testimony at the administrative hearing, to have a measure of sympathy for him for he is, in a sense,

Yet such a reading of *Gnotta* cannot be seriously maintained. Judge Blackmun pointedly observes that "we could" and "we might" decide the case by ruling on the factual issue of whether discrimination was proved, but he decides that the sovereign immunity question comes first.⁹² Thus we must turn to a second reading of *Gnotta*—that it found sovereign immunity to apply even where it is alleged that officers had acted unconstitutionally and in excess of their authority.

This reading of *Gnotta* still leaves the case extremely puzzling, however, for Judge Blackmun did not wholly ignore the *Larson-Dugan* exceptions to sovereign immunity. In a one-sentence acknowledgment of Supreme Court authority, the opinion succinctly states:

This obviously is not a case which concerns either of the exceptions recognized in *Dugan v. Rank*, . . . namely, where the officer's act is beyond his statutory power or where, although the action is within the scope of his authority, the power, or the manner of its exercise, is constitutionally void. See *Simons v. Vinson*.⁹³

There is no discussion why the case so "obviously" fell outside the *Larson-Dugan* exceptions. Nor does the reference to *Simons v. Vinson*⁹⁴ immediately enlighten us. That was a suit to quiet title where the claim of an ultra vires taking was based upon the unwarranted assumption that the United States did not own the land. The case was apparently cited only as a general reference to the rule that where official action is not ultra vires or unconstitutional, immunity will attach.

How then can we explain why Judge Blackmun thought the *Larson-Dugan* exceptions inapplicable? A careful reading of the opinion shows that the possible unconstitutionality of the defendants' actions is not in the minds of the judges. Although the relevant Executive Order⁹⁵ is discussed at great length, there is no hint of a constitutional cause of action. Indeed, *Gnotta's* petition for

"bucking the establishment" or what seems to him to be an inflexible employment hierarchy Contrastingly, one must note that the plaintiff chose to be sensitive about, rather than to assert rightful pride in, his Italian ancestry." *Id.*

⁹² 415 F.2d at 1276.

⁹³ 415 F.2d at 1277 (citations omitted).

⁹⁴ 394 F.2d 732 (5th Cir.), cert. denied, 393 U.S. 968 (1968).

⁹⁵ Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965). It was substantially identical to current Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969).

certiorari in the Supreme Court reveals that he did not seek review based on a substantive violation of the fifth amendment's due process clause.⁹⁶

Since Gnotta had not based his cause of action on the Constitution, the only applicable *Larson-Dugan* exception would be the ultra vires action formula. This interpretation of the court's understanding of the case also explains why Judge Blackmun cited an unrelated land title case such as *Simons v. Vinson*⁹⁷ to support his ruling that the exceptions were not present—in that case the ultra vires approach rather than the unconstitutional action argument had been pressed and rejected.⁹⁸

With this understanding of the case, one can begin to see the outlines of an argument that would have supported Judge Blackmun's bald assertion that no sovereign immunity exception applied to Gnotta's claim. It would build upon one of the inherent weaknesses in *Larson*—the problem of drawing the dividing line between activity which is merely "illegal" and that which is in excess of authority or done without authority.⁹⁹ The *Gnotta* court may have felt that since the supervisor had general authority to promote personnel, any discrimination he practiced was merely illegal, a mistake of law, and not outside his authority.¹⁰⁰ Even though the court may have erred in this determination, such an analysis is at least founded on the *Larson-Dugan* framework.¹⁰¹

⁹⁶ Petition for Writ of Certiorari at 7, *Gnotta v. United States*, 397 U.S. 934 (1970), *denying cert.* to 415 F.2d 1271 (8th Cir. 1969). He instead wove an intricate argument relying upon the executive order to create a substantive right from which the court would imply a cause of action. *Id.* at 7, *citing* *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968). *See* 415 F.2d at 1278-79.

⁹⁷ *See* quotation at p. 339 *supra*.

⁹⁸ *See* note 96 *supra*.

⁹⁹ *See* p. 332 & note 50; p. 334 *supra*.

¹⁰⁰ The court emphasized that promotion decisions involve the exercise of administrative discretion not normally subject to judicial review. 415 F.2d at 1276-77.

¹⁰¹ The counterargument would stress that the supervisor is denied authority by the specific executive order to allow discriminatory intent to influence his decisions. Denied such authority to discriminate, he acts ultra vires in making national ancestry the basis of his decision. *See Penn v. Schlesinger*, 490 F.2d 700, 703, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc). The tension between the two lines of argument is illustrated in another context by the majority and the dissent in *Sierra Club v. Hickel*, 467 F.2d 1048 (6th Cir. 1972), *cert denied*, 411 U.S. 920 (1973).

As to whether the ultra vires argument was properly applied in *Gnotta* itself, it is interesting to note that Solicitor General Griswold expressly refused to rely on the sovereign immunity argument when the Supreme Court considered the case. Memorandum for the Respondents in Opposition, *Gnotta v. United States*, 397 U.S. 934 (1970), *denying cert.* to 415 F.2d 1271 (8th Cir. 1969). *See also* note 100 *supra*.

2. Beale v. Blount¹⁰²

Whether one takes the uncharitable view that *Gnotta* was simply wrong in ruling out the *Larson-Dugan* exceptions or the more realistic view that the court did not have before it the unconstitutional action argument, it is clear that the *Gnotta* decision should have had no force in the Fifth and Sixth Circuit cases that followed it.¹⁰³ In each of those cases the black employees involved specifically stated their claims in terms of illegalities of constitutional proportion.¹⁰⁴ Although the Fifth Circuit started out with an easy per curiam adoption of the *Gnotta* precedent,¹⁰⁵ a subsequent panel soon realized that something was seriously amiss in the *Gnotta*-inspired superstructure. Still erroneously reading the case to control suits alleging constitutional wrongs, the second panel began in *Beale v. Blount*¹⁰⁶ to carve out exceptions of an order other than those mentioned in *Larson*. Though the court's sense of uneasiness with *Gnotta* was correct, its solution was wrong.

Beale alleged that his discharge by the United States Post Office was racially motivated, claiming that local postal officials provoked him to violence and then handed him sterner punishment than was imposed on white employees. Although he had at first requested damages, this prayer was dropped, and the only relief at issue was his request for reinstatement and general injunctive relief.¹⁰⁷

The district court had dismissed the suit for failure to exhaust administrative remedies, but the court of appeals chose to face the sovereign immunity issue first.¹⁰⁸ Searching for a way to limit the *Gnotta* holding, the court manufactured a distinction between personal reinstatement and other injunctive relief. In three brief

¹⁰² 461 F.2d 1133 (5th Cir. 1972).

¹⁰³ See notes 20-22 *supra*. Claims under 42 U.S.C. § 1981 (1970), see note 29 *supra*, are also constitutionally based, deriving from Congress' power to define badges of slavery violative of the thirteenth amendment. Cf. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 437-44 (1968). Official action in violation of § 1981 may also be considered ultra vires the officer's authority. See *Penn v. Schlesinger*, 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc).

¹⁰⁴ *Penn v. Schlesinger*, 490 F.2d 700, 702, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974); *Blaze v. Moon*, 440 F.2d 1348, 1349 (5th Cir. 1971); *Ogletree v. McNamara*, 449 F.2d 93, 95 (6th Cir. 1971); see *Beale v. Blount*, 461 F.2d 1133, 1136 (5th Cir. 1972) (invoking civil rights statutes which enforce constitutional rights).

¹⁰⁵ *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971).

¹⁰⁶ 461 F.2d 1133 (5th Cir. 1972).

¹⁰⁷ *Id.* at 1135-37 & n.2.

¹⁰⁸ *Id.* at 113.

paragraphs directing us to no authorities other than *Gnotta* and the circuit's prior decision, which had cited only *Gnotta*,¹⁰⁹ the panel first held that the "request for *injunctive relief* against the defendants' allegedly racially discriminatory practices" was barred by the doctrine of sovereign immunity.¹¹⁰ However, the court then declared that mandamus for reinstatement traditionally "has been regarded as an exception to the doctrine that suits may not be maintained against the United States without its consent."¹¹¹ The panel decided that although the plaintiff had requested "injunctive relief" which it found barred by the immunity doctrine, his request for reinstatement would be treated as a petition for a "mandatory injunction" or mandamus.¹¹² Said the court, "This by-passes the obstacle of the doctrine of sovereign immunity . . ."¹¹³

The court was not entirely without citation to support its argument that mandamus is an independent exception to the sovereign immunity doctrine. But the sole case on which it relied, *Clackamas County v. McKay*,¹¹⁴ is not authority for such a proposition. After a lengthy discussion of the uses of mandamus and the sovereign immunity exceptions that had been only recently reviewed in *Larson v. Domestic and Foreign Commerce Corp.*,¹¹⁵ the *McKay* court explicitly held that a "non-discretionary act required of an official *falls within the exception stated in the Larson case* . . . relating to acts without authority."¹¹⁶

¹⁰⁹ *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971), was the case. Only Judge Coleman sat on both the *Blaze* and *Beale* panels.

¹¹⁰ 461 F.2d at 1137 (emphasis added).

¹¹¹ *Id.* at 1137. The court ignored the fact that *Gnotta*, which it had just found controlling on the injunctive relief issue, had also rejected mandamus as a basis for relief. See 415 F.2d at 1273.

¹¹² 461 F.2d at 1137, 1138. Of course, the writ of mandamus has been abolished in federal district courts in favor of the unitary civil action. See Fed. R. Civ. P. 81(b). Relief in the nature of mandamus is still available, however, upon the grounds for which mandamus was previously granted. *Id.*; cf. 28 U.S.C. § 1361 (1970). Mandamus will issue to compel an officer to perform a ministerial duty imposed upon him by law. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). While it is often said that mandamus cannot control discretionary decisions, that somewhat overstates the matter. If an officer has discretion within limits mandamus may be used to confine his decisions to those limits setting aside those made outside his discretion. See, e.g., *Work v. United States ex rel. Rives*, 267 U.S. 175, 177-78 (1925). See generally Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

¹¹³ 461 F.2d at 1138.

¹¹⁴ 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955).

¹¹⁵ 337 U.S. 682 (1949).

¹¹⁶ 219 F.2d at 493 (emphasis added). Mandamus cases fall within the *Larson*-

What the *Beale* court saw in *McKay*, therefore, was not a special sovereign immunity rule for mandamus but rather a reflection of the general rules expressed in *Larson*. Adoption of mandamus as an exception to sovereign immunity surely accomplished the *Beale* court's diplomatic need to respect a prior Fifth Circuit precedent adopting *Gnotta*. But the diplomatic victory was costly: the narrow relief of reinstatement was allowed, but injunctive relief, which is just as permissible under *Larson* as reinstatement, was unjustly banned.

Thus *Beale*, although a step in the right direction, clings unnecessarily to *Gnotta* and thus perpetuates an error that could have serious consequences in a case where the mandamus remedy would not lie but where injunctive relief would, except for the *Beale-Gnotta* bar, be available.¹¹⁷ The shortest route out of this forest is back to the established rules: where plaintiffs contend that federal officers have acted unconstitutionally, the first of the *Larson-Dugan* exceptions clearly applies, and the suit, regardless of its jurisdictional basis, may not be construed as one against the United States.¹¹⁸

3. Recent Case Developments

While the Sixth Circuit has only recently reaffirmed its commitment to the sovereign immunity doctrine in employment cases,¹¹⁹ recent decisions in the Fifth and Ninth Circuits indicate that

Dugan exceptions because in each case the official is alleged to have acted contrary to his authority in refusing to undertake the required activity. See *Menard v. Mitchell*, 430 F.2d 486, 493 n.36 (D.C. Cir. 1970); *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 564-65 (D.C. Cir. 1970). See also note 112 *supra*. In fact, sovereign immunity can be a successful defense in a mandamus action. Where mandamus does not lie because the challenged official action is discretionary, the court may dispose of the case on sovereign immunity grounds. See *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971); *White v. Administrator of Gen. Servs. Adm'n*, 343 F.2d 444 (9th Cir. 1965); *Smith v. United States*, 333 F.2d 70 (10th Cir. 1964). See generally Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties Mandamus*, 75 HARV. L. REV. 1479 (1962).

¹¹⁷ Cf. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (discrimination in site selection and housing construction; decision to build discretionary). But see note 112 *supra*.

¹¹⁸ See p. 335 *supra*. The case is ordinarily now ready for trial. See *Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971), on remand from 430 F.2d 486 (D.C. Cir. 1970); *Land v. Dollar*, 82 F. Supp. 919 (D.D.C. 1948), *rev'd*, 184 F.2d 245 (D.C. Cir. 1950), on remand from 330 U.S. 731 (1947).

¹¹⁹ See note 21 *supra*.

the courts may well be moving back to the basic *Larson-Dugan* position. The Fifth Circuit has continued its retreat from *Gnotta* in *Penn v. Schlesinger*.¹²⁰ There, black federal employees, suing on behalf of themselves and similarly situated blacks in Alabama, alleged that 17 federal agencies in the state maintained racially discriminatory promotion and advancement practices. Plaintiffs based one cause of action on 42 U.S.C. § 1981.¹²¹ The court first held the mandamus exception of *Beale*¹²² to be applicable.¹²³ It further held that the *Larson-Dugan* exceptions were applicable and that a violation of Section 1981 by a federal official was an ultra vires act, court consideration of which was not barred by sovereign immunity.¹²⁴ Thus in *Penn*, the court both retained its allegiance to the circuit's *Gnotta*-type precedents and returned to the *Larson-Dugan* exceptions.¹²⁵ As we noted earlier,¹²⁶ mandamus as an exception to sovereign immunity is merely one example of the *Larson-Dugan* rules as applied. The practical result of the *Penn* decision, therefore, is to reinstate the *Larson-Dugan* exceptions, with mandamus getting "double coverage."¹²⁷

One other recent decision should also be noted. The Ninth Circuit, in *Bowers v. Campbell*,¹²⁸ faced the issue of sovereign immunity in federal employment discrimination suits for the first time. Significantly, the court ignored *Gnotta* and simply held the *Larson-Dugan* exception applicable.¹²⁹ The court did cite *Beale v. Blount* for the proposition that sovereign immunity may limit the

¹²⁰ 490 F.2d 700, *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc).

¹²¹ 42 U.S.C. § 1981 (1970) reads: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . ." In *Sanders v. Dobbs Houses Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971), the Fifth Circuit held that Section 1981 provided a cause of action against private employment discrimination. In the instant case, the court extended that holding to discriminatory acts by federal officials. 490 F.2d at 702.

¹²² See pp. 341-42 *supra*.

¹²³ 490 F.2d at 701.

¹²⁴ *Id.* at 703-04.

¹²⁵ *Id.* at 704-05. The en banc reversal, 497 F.2d 970 (5th Cir. 1974), was solely on the grounds of exhaustion of administrative remedies.

¹²⁶ See pp. 342-43 *supra*.

¹²⁷ See *Petterway v. Veterans Adm'n Hosp.*, 495 F.2d 1223 (5th Cir. 1974).

¹²⁸ 505 F.2d 1155 (9th Cir. 1974).

¹²⁹ *Id.* at 1158. The court found that racially discriminatory employment decisions by federal officials were ultra vires their authority as limited by 42 U.S.C. § 1981 (1970).

relief to which the plaintiff would ultimately be entitled,¹³⁰ but it appeared to defer the relief issue until after trial.¹³¹

In short, recent developments suggest that *Gnotta's* persuasiveness in other circuit courts is waning. The *Larson-Dugan* rules are being reasserted to allow federal employees to obtain a trial on their claims of racial discrimination. This return to basic concepts will, in most suits, end all talk of sovereign immunity. Yet *Penn* and *Bowers*, pursuing what was only implied in *Beale*,¹³² realized that specific relief orders may create a second set of sovereign immunity problems. In this area there are no clear rules of the *Larson-Dugan* type to guide courts. Indeed, as we shall see, the courts are searching for standards to define what role sovereign immunity should play in determining relief for plaintiffs who are successful in establishing federal employment discrimination.

Since there is a search for standards in this area, the next part of the Article will turn away from employment discrimination cases to a more general consideration of the interests that underlie sovereign immunity. Finding those interests to be the separate constitutional powers of the branches of the federal government, we shall show how a separation of powers analysis provides the best standards for considering relief issues that arise under the label of sovereign immunity.

II. SEPARATING THE JURISDICTIONAL AND RELIEF ASPECTS OF SOVEREIGN IMMUNITY

A. The Precedents

We saw above that recent employment discrimination cases have begun to separate two distinct issues often merged in sovereign immunity analysis¹³³—jurisdiction to entertain the suit and power to grant certain kinds of relief. The *Larson-Dugan* exceptions respond only to the first of these issues; if the complaint fails to claim that the challenged action falls outside the officers' constitutional or statutory authority, the court is without jurisdiction to hear the suit. But even if the exceptions apply to give the court jurisdiction to hear

¹³⁰ 505 F.2d at 1158.

¹³¹ *Id.* Cf. *Petterway v. Veterans Adm'n Hosp.*, 495 F.2d 1223, 1225 (5th Cir. 1971).

¹³² See pp. 341-42 *supra*.

¹³³ See pp. 343-44 *supra*.

the claim, the court might nevertheless be barred by sovereign immunity considerations from granting certain types of relief.

The *Larson* court itself suggested in a footnote that the form of relief could intrude upon legitimate interests of the sovereign:

Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22 (1890).¹³⁴

While it is true that cases predating *Larson* often merged the jurisdictional and relief aspects of sovereign immunity,¹³⁵ modern Supreme Court cases have recognized the separation. In a recent decision involving state sovereign immunity,¹³⁶ *Edelman v. Jordan*,¹³⁷ the Court made this distinction explicit. The case challenged the constitutionality of state administration of a joint federal-state welfare program. The court of appeals ruled that the defendant officials' actions were inconsistent with overriding federal law and therefore unconstitutional under the Supremacy Clause.¹³⁸ The court reasoned that once the sovereign immunity hurdle has been cleared by a finding of unconstitutional action, both prospective injunctive relief and retroactive welfare payments were available as remedies.¹³⁹ The Supreme Court disagreed on the retroactive payments issue. In an opinion by Justice Rehnquist, the Court held that while federal courts have the power to require the states to run their programs

¹³⁴ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

¹³⁵ See, e.g., *North Carolina v. Temple*, 134 U.S. 22 (1890); *Noble v. Union R.L. Ry.*, 147 U.S. 165 (1893). These cases can be explained by the slow evolution of sovereign immunity rules, see pp. 329-35 *supra*, and traditional American civil procedure's merging of the concepts of cause of action and relief. See R. Field & B. Kaplan, *CIVIL PROCEDURE* 216-30, 261-75, 306-13 (temp. 2d ed. 1968) (collecting English and American sources).

¹³⁶ U.S. CONST. amend. XI.

¹³⁷ 415 U.S. 651 (1974).

¹³⁸ *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

¹³⁹ *Id.* at 990-95. The court admitted that on certain occasions equitable relief would be unavailable, but it associated these occasions with the nature and status of the parties rather than with the relief power itself. See *id.* at 992 (nonresident suits under state-created causes of action).

constitutionally or not at all in the future, they have no power,¹⁴⁰ because of the sovereign immunity doctrine, to order retroactive payments from the state treasury.¹⁴¹

The distinction between the jurisdictional and relief aspects of sovereign immunity has important practical ramifications. On the one hand, once the separation is acknowledged, judicial reluctance to grant any specific relief requested can no longer serve to bar the plaintiff's entire suit.¹⁴² On the other hand, recognition of a second stage of sovereign immunity analysis means that there may remain at the relief stage a legitimate role for some governmental interests rebuked at the *Larson-Dugan* level of analysis, such as the executive's asserted interest in controlling its own employment practices.¹⁴³ Finally, in those cases where some legitimate governmental interests are recognized at the relief stage, courts will have to face the difficult task of formulating relief which will clearly protect the plaintiff's constitutional rights without interfering in protected governmental functions.

B. Current Approaches to the Relief Issue

Even after the separate nature of the relief issue is established, there remains the difficult problem of determining the circumstances in which sovereign immunity may be utilized to bar relief. Whereas

¹⁴⁰ 415 U.S. 663-64. The Court adhered to the verbal formulation that eleventh amendment sovereign immunity "partakes of the nature of a jurisdictional bar." *Id.* at 678. This does not indicate a lack of jurisdiction over the subject matter of the suit—the case had been tried already and partial relief given. Rather the jurisdictional issue here is lack of jurisdiction—power—to order the relief described by the Court.

¹⁴¹ Two recent Second Circuit cases illustrate how the lower courts have managed to separate jurisdictional and relief aspects of sovereign immunity. In both cases the court allowed the suit alleging unconstitutional action to be brought but ruled that certain kinds of relief violated sovereign immunity principles. See *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (*en banc*) (injunctive relief permitted, damages refused).

¹⁴² Of course, where the plaintiff limits himself to asking for relief which is known to be barred, it is an empty gesture to permit a full trial. That will usually not be the case, however. See cases cited in note 141 *supra*.

¹⁴³ Although *Gnotta* and the cases which followed it were decided on sovereign immunity grounds, it is apparent that the courts were more concerned with the power of the executive branch to control its employment practices without court interference. See *Gnotta v. United States*, 415 F.2d at 1276-77; *Ogletree v. McNamara*, 449 F.2d 93, 99-100 (6th Cir. 1971); *Penn v. Schlesinger*, 490 F.2d 700, 707 (dissenting opinion), *adopted* 497 F.2d 970 (1974) (*en banc*).

the *Larson-Dugan* exceptions are easily, almost mechanically applied, there is no consensus over what test should be used to decide sovereign immunity issues at the relief stage of a suit. Court decisions suggest various approaches to dealing with this critical problem.

1. An Intolerable Burden Test

One approach has been to return to *Larson's* footnote eleven, where the Court observed that a suit may fail, even after clearing the initial sovereign immunity hurdles, if the relief requested would require affirmative action by the sovereign or disposition of government property.¹⁴⁴

Courts discussing footnote eleven have emphasized the word "may" to show that in such a situation the suit need not necessarily fail, but simply *may* fail. They point out that reading the footnote broadly to outlaw every injunction interfering with government programs would render meaningless the *Larson* text's dual exceptions to the immunity doctrine.¹⁴⁵ This view is supported by the text of the Court's opinion in *Larson*, which suggests that not all affirmative relief is forbidden. The Court cites approvingly several cases in which the defendant was ordered to take action in his official capacity.¹⁴⁶ Mandamus cases further attest to the fact that affirmative relief does not automatically raise the bar of sovereign immunity.¹⁴⁷

As a guideline for what is included within the "may" of footnote eleven, several courts have suggested an "intolerable burden" test. The Seventh Circuit's decision in *Schlaflly v. Volpe*,¹⁴⁸ an impoundment case, is a recent example. In that case the Secretary of Transportation had allegedly exceeded his authority in impounding certain highway trust funds from distribution to the states, and thus the *Larson-Dugan* exception for ultra vires acts erased sovereign immunity as a defense to the hearing of the suit.¹⁴⁹

¹⁴⁴ 337 U.S. at 691 n.11. The footnote is set out in full at p. 346 *supra*.

¹⁴⁵ See, e.g., *Washington v. Udall*, 417 F.2d 1310, 1317 (9th Cir. 1969); *Turner v. King's River Conservation Dist.*, 360 F.2d 184, 189-90 (9th Cir. 1966).

¹⁴⁶ Most important in this regard is the Court's reference to habeas corpus, where defendant jailors, who held prisoners only by virtue of an official duty, are ordered to release the prisoner. 337 U.S. at 690.

¹⁴⁷ Compare *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218 (1913), with *Clackamas County, Ore. v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955).

¹⁴⁸ 495 F.2d 273 (7th Cir. 1974).

¹⁴⁹ *Id.* at 278-79.

Nevertheless, since the plaintiff requested that the Secretary be ordered to release the improperly impounded funds, the court was faced with footnote eleven's warning that such affirmative relief "may" violate sovereign immunity.¹⁵⁰ The "intolerable burden" test adopted by the court gives content to the "may" with a foreseeability test—determining what action the government probably would have taken absent the defendant official's *ultra vires* action. If the requested relief asks approximately for what was statutorily required but not executed, then the intrusion upon legitimate governmental interests is apparently judged tolerable,¹⁵¹ at least when compared to the harm done to the plaintiffs if no relief is granted.¹⁵²

The intolerable burden test is quite attractive in that it functionally seeks to identify the legitimate governmental interests that might be harmed by granting relief. The foreseeability aspect of the inquiry, however, is useful only in cases where *ultra vires* action has been found, for in such cases the offending officials are interjecting only their personal (albeit policy-based) interest in subverting Congress' command. The government's interest is simply assumed to be that established in the legislation, and therefore judicially requiring the official to act as Congress directed by *tautology* imposes no "intolerable burden" on governmental operations.¹⁵³

Where unconstitutional action is at issue, however, the burden test becomes wholly subjective because the court has no standards to guide its determination of tolerability. For example, does an order requiring that a class of unconstitutionally discharged employees be given back pay totaling several million dollars impose an intolerable burden? Here the government has a fiscal interest entirely distinct

¹⁵⁰ *Id.* at 279-80.

¹⁵¹ *Id.* at 280. In the impoundment situation, the *Schlaflly* court notes that but for the Secretary's action the funds sought would have been disbursed as required by Congress. Thus, the requested affirmative relief—ordering the release of funds—would burden the government fisc "only to the extent that Congress has already authorized" *Id.*, quoting *State Highway Comm'n. v. Volpe*, 479 F.2d 1099, 1123, *rehearing denied*, 479 F.2d 1122 (8th Cir. 1973).

¹⁵² The *Schlaflly* court suggests that the intolerable burden test is an equitable balancing act, measuring whether the relief order's burden on governmental functions outweighs private harm. 495 F.2d at 280. Yet since the court finds the burden in the case before it negligible, it does not face the question of whether a private harm might ever be so great as to justify a considerable burden on government activities, and thus we cannot be sure that the equitable balancing is meant as a serious aspect of the intolerable burden test. *Cf. Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969).

¹⁵³ *See, e.g., Schlaflly v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974).

from its legislated interest in having an officer carry out his duties, and certainly any court order in this area would interfere with the former interest to some degree. But what degree of interference creates an "intolerable" burden? Nor do the foreseeability aspects of the burden test lead us out of this subjective inquiry. It is, of course, evident that the employees would have been paid but for the official's unconstitutional action, but does that question show us whether the burden of using the agency's operating funds for back pay is an "intolerable" burden?¹⁵⁴

The *Schlafly* result certainly has a visceral appeal. Where unconstitutional action is charged, however, its intolerable burden test offers little firm guidance to courts faced with a sovereign immunity argument concerning relief. Basically tautological in conception, it leads ultimately to a wholly subjective inquiry.

2. An Affirmative Relief Test

A second line of cases trying to define the sovereign immunity aspects of relief also focuses on *Larson's* footnote eleven.¹⁵⁵ These cases ignore the footnote's "may" language, assume that all affirmative relief is barred, and then try to determine what relief is in fact affirmative and what is only prohibitory. Thus the test becomes not the tolerability of the relief but whether the relief should be characterized as affirmative or negative.

The Eighth Circuit, in *State Highway Commission v. Volpe*,¹⁵⁶ used this approach in considering the same impoundment issue that the Seventh Circuit faced in *Schlafly v. Volpe*.¹⁵⁷ As in the functional analysis used in the "intolerable burden" test, the court attempted to discern what is in fact "affirmative" relief by focusing on what would have happened but for the defendant official's action.¹⁵⁸ Thus applied, the affirmative relief test suffers the same drawbacks noted in the intolerable burden test.¹⁵⁹

¹⁵⁴ Cf. *Edelman v. Jordan* 415 U.S. 651 (1974) (order of back benefits to welfare recipients necessarily diminishes amount available for others).

¹⁵⁵ For the text of the footnote see p. 346 *supra*.

¹⁵⁶ 479 F.2d 1122, denying rehearing to 479 F.2d 1099 (8th Cir. 1973).

¹⁵⁷ 495 F.2d 273 (7th Cir. 1974), discussed at p. 348 *supra*.

¹⁵⁸ 479 F.2d at 1123 (citations omitted). Similar arguments have been advanced by commentators with regard to other disbursement situations. See Block, *supra* note 35, at 1063-64; Davis, *supra* note 35, at 15-16.

¹⁵⁹ See p. 349 *supra*.

Nor does it seem possible to decide whether a relief order is affirmative or negative by referring to its inherent nature. Whether an order is classified as prohibitory or mandatory depends to a great degree on how the court chooses to word its order;¹⁶⁰ to prohibit an official from refusing to undertake an act is often no different from compelling him to act.¹⁶¹ Thus, this approach too appears to offer little help in devising standards for sovereign immunity issues in the relief context.

3. *The Inductive Logic Approach*

Some courts and commentators have come to the conclusion that an analytical solution to the problem of sovereign immunity implications of relief is hopeless. Finding the Supreme Court's reasoning in sovereign immunity cases to be confusing and contradictory,¹⁶² they look only at the case results, try to determine what kinds of relief seem to give the Court the most trouble, and from the results inductively formulate a few simple rules.

This approach has met with mixed success. Most law review articles begin by cataloguing the cases decided one way and another,¹⁶³ try inductively to formulate some guidelines, and end up declaring the whole line of cases a disaster area.¹⁶⁴ Many draw the conclusion that cases dealing with damages against the government or disposition of government-held property are likely to face

¹⁶⁰ See, e.g., *Perkins v. Elg*, 307 U.S. 325 (1939). There, the Secretary of State had denied Miss Elg a passport "solely on the ground" that she was not an American citizen. *Id.* at 349. She established her legal right to American citizenship. In considering what relief to grant, the Court faced the question of whether the Secretary of State should be included in the Court's decree. The Court decided that despite the Secretary's powers of discretion regarding passports, mandamus should issue. "The decree," reasoned the Court, ". . . would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship." *Id.* at 350.

¹⁶¹ See Block, *supra* note 35, at 1073-74 (arguing that the distinction between affirmative and negative relief is in most cases artificial).

¹⁶² See Schlaflly v. Volpe, 495 F.2d 273, 278 (7th Cir. 1974); Knox Hill Tenant Council v. Washington, 448 F.2d 1045, 1051 (D.C. Cir. 1971); Littell v. Morton, 445 F.2d 1207, 1212 (4th Cir. 1971); cf. Zapata v. Smith, 437 F.2d 1024, 1025 (5th Cir. 1971).

¹⁶³ E.g., Davis, *supra* note 35, at 8-17; Cramton, *supra* note 31, at 400-05, 422-27; Block, *supra* note 35, at 1063-75.

¹⁶⁴ E.g., Cramton, *supra* note 31, 418-20.

dismissal on immunity grounds,¹⁶⁵ but they seem able to account for the developments only in historical terms.¹⁶⁶ While some recommend legislative reform to clear the air,¹⁶⁷ others suggest maxims to guide the Court.¹⁶⁸

The inductive logic approach has a respectability brought on by Supreme Court usage, the most recent example being Justice Rehnquist's opinion for the Court in *Edelman v. Jordan*.¹⁶⁹ Rather than trying to formulate a general rule, Justice Rehnquist was satisfied simply to define the area of concern, payments from the government treasury.¹⁷⁰ The remainder of the opinion is devoted to showing that *in futuro* relief orders do not necessarily require treasury payments or disrupt fiscal planning while retroactive payments do have such an impact.¹⁷¹

Yet the precedents are not as clear as Justice Rehnquist would have us believe, and that is the problem with the inductive logic approach. For every case forbidding relief that has an impact on the public treasury, a contrary opinion approving such orders can be found. Indeed, the Court, only one term after its *Edelman* opinion, approved by unanimous vote a relief order requiring the treasury to pay out funds appropriated for water pollution control projects.¹⁷²

¹⁶⁵ See, e.g., *id.* at 402, 423; Davis, *supra* note 35, at 8-18; Block, *supra* note 35, at 1072-73.

¹⁶⁶ See, e.g., Block, *supra* note 35, at 1073.

¹⁶⁷ E.g., Cramton, *supra* note 31, at 428-29 (recommending a proposal by the Administrative Conference of the United States); Borchard, *supra* note 35, at 3.

¹⁶⁸ E.g., Davis, *supra* note 35, at 17 (government responsibility is to be preferred "over irresponsibility"); Laski, *supra* note 35, at 466 (the real need is the enforcement of responsibility); Cramton, *supra* note 31, at 415 (ask whether the benefits of review are outweighed by interference with government programs).

¹⁶⁹ 415 U.S. 651 (1974). For an earlier example see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 714-15 (1949) (Frankfurter, J., dissenting).

¹⁷⁰ *Id.* at 663.

¹⁷¹ *Id.* at 664-70. The extent to which *Edelman* might affect state employment discrimination cases is unclear. Monetary recoveries, whether for attorneys' fees or back pay, seem to be in jeopardy, although it remains to be seen whether both would be treated the same under *Edelman*. As to attorneys' fees, compare *Jordan v. Fusari*, 496 F.2d 646 (2d Cir. 1974), with *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *Skehan v. Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974). An en banc opinion is expected soon to resolve the split on this issue within the Fifth Circuit. Compare *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973), with *Named Individual Members v. Texas State Highway Dep't*, 496 F.2d 1017 (5th Cir. 1974).

¹⁷² See *Train v. City of New York*, 95 S. Ct. 839 (1975). The Court accepted the government's concession of the sovereign immunity issue, *id.* at 843 n.7, which was more fully litigated in the lower courts. See *City of New York v. Train*, 494 F.2d 1033, 1038-39 & n.12 (D.C. Cir. 1974), *aff'g*, 358 F.Supp. 669, 673 (D.D.C. 1973).

Among the older cases, conflicting decisions relating to land decrees and money judgments are numerous.¹⁷³

These inductive logic approaches do not advance our inquiry because they identify problem areas without telling us why they are problem areas. They identify the types of relief that courts are reluctant to grant, but they do not explain the cause of the reluctance. Why are affirmative orders to release public funds permitted in some cases but forbidden in others? Why were judgments against sovereign land and the public treasury thought to raise sovereign immunity problems? Might interference with executive control over hiring and promotion be thought to raise similar considerations in the 1970's?

The next Section of this Article will try to develop an analytical framework that is consistent with the considerations expressed in the original *Larson-Dugan* exceptions and that can identify which considerations are important in cases where affirmative relief against federal officials in their official capacities is requested. This mode of analysis builds on our traditional constitutional law notions of separation of powers. It is these considerations that hide behind the mask of sovereign immunity.

III. SOVEREIGN IMMUNITY AS A SEPARATION OF POWERS ISSUE

A. The Larson-Dugan Exceptions

Any discussion of sovereign immunity doctrine as a device for allocating constitutional decisionmaking power must be based upon an appreciation of the substantive constitutional roles of the several branches of government. This Section provides that background. It also goes further and shows how the *Larson-Dugan* exceptions, the elemental jurisdictional rules of sovereign immunity, define the interface between the basic substantive roles performed by the judiciary, Congress, and the executive. In suggesting that separation of powers interests accurately account for the *Larson-Dugan* jurisdictional aspects of sovereign immunity, we lay the groundwork for a later showing that these interests also underlie the sovereign immunity aspects of relief.

¹⁷³ See *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962) (land); compare *Cunningham v. Macon & B. R.R.*, 109 U.S. 446 (1883), with *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872); compare *Virginia Coupon Cases*, 114 U.S. 269 (1884), with *Hagood v. Southern*, 117 U.S. 52 (1886).

1. The Judiciary's Power and Obligation

We begin with two straightforward propositions about judicial power. First, the Court in its role as interpreter of the Constitution is competent to decide constitutional issues whenever it has proper jurisdiction. Second, that power is not merely permissive, it is mandatory and carries a corollary duty to provide redress for constitutional violations whenever possible. The first proposition looks like black letter law, but it runs up against the sovereign immunity doctrine under which courts have refused to exercise their otherwise proper jurisdiction. The following discussion will suggest that sovereign immunity as a self-limiting device is quite possibly unconstitutional. That argument will be the predicate for later establishing that sovereign immunity must have its roots in limitations due to the prerogatives and powers of another branch of government and not in judicial *self*-denial.

The competence of the federal courts to hear and determine constitutional issues springs from article III and *Marbury v. Madison*.¹⁷⁴ The Court's appellate jurisdiction under article III gives it an independent institutional power. Although Congress may by statute limit this jurisdiction,¹⁷⁵ the Court's interest is sufficiently strong, it has been argued, that any wholesale attempt to limit Supreme Court review of constitutional questions would itself be unconstitutional.¹⁷⁶

¹⁷⁴ 5 U.S. (1 Cranch) 137 (1803). The power assumed in *Marbury* to rule on the constitutionality of congressional statutes was later used to pass on the question of whether actions taken by federal and state executive officials were consistent with constitutional restrictions. See, e.g., *Perkins v. Elg*, 307 U.S. 325 (1939) (civil action); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (habeas corpus) (both cases involving unconstitutional action by federal officials); *Ex parte Young*, 209 U.S. 123 (1908); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (state officials). The Court recently reaffirmed its authority to determine whether the other branches of government had overstepped their powers. *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).

¹⁷⁵ U.S. CONST. art. III, § 2. The power of limitation extends only to the appellate jurisdiction. A legislative restraint on district court jurisdiction may limit the Court's appellate jurisdiction from those federal courts, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), but will not limit the Court's appellate jurisdiction over the subject matter, which still may come up through the state courts.

¹⁷⁶ See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960); cf. R. Berger, CONGRESS V. THE SUPREME COURT 285-96 (1969). But see Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).

If Congress cannot undercut the Court's power to decide constitutional questions, neither may the Court itself refuse to do its job of constitutional adjudication. It may not decline to exercise the jurisdiction conferred upon it by the Constitution¹⁷⁷ and Congress.¹⁷⁸ As Chief Justice Marshall said a century and a half ago in *Cohens v. Virginia*,¹⁷⁹

It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.¹⁸⁰

Certainly the Court's appellate jurisdiction has become more discretionary since the introduction of certiorari, but that manner of controlling the docket may properly be characterized as a congressionally mandated exception to jurisdiction as authorized under article III.¹⁸¹ Similarly, although the Court has developed techniques, as Justice Brandeis called them, "for its own governance in the cases confessedly within its jurisdiction,"¹⁸² these practices are not truly refusals to hear a constitutional issue. Rather they are either demands that the issue be framed in a manner capable of judicial resolution or methods for exercising jurisdiction and deciding the case, albeit not on constitutional grounds.¹⁸³ Indeed, on those

Congress has at times limited appellate jurisdiction as to certain causes of actions, see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), but with little impact on the Court's actual appellate review power, see *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); 2 Warren, *THE SUPREME COURT IN UNITED STATES HISTORY* 455-95 (1935 ed.). In this century Congress has by statute approved a complete Supreme Court appellate jurisdiction as to constitutional issues. See 28 U.S.C. §§ 1252-58 (1970).

¹⁷⁷ U.S. CONST. art. III.

¹⁷⁸ 28 U.S.C. §§ 1252-58 (1970).

¹⁷⁹ 19 U.S. (6 Wheat.) 264 (1821).

¹⁸⁰ *Id.* at 404.

¹⁸¹ U.S. CONST. art. III, § 2.

¹⁸² *Ashwander v. T.V.A.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

¹⁸³ See *id.* at 346-48. Brandeis' rules one (adversariness), five (standing), and six (standing), and perhaps two, fall in the first category and stem from the constitutional limitation on the court to hear only "cases and controversies." Cf. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Brandeis rules three (narrow ruling), four (nonconstitutional grounds), and seven (narrow statutory

occasions when the Court, by stretching one of the Brandeisian rules, has come close to evading its constitutional duty to hear constitutional questions, it has drawn heavy fire.¹⁸⁴ Adjudicating the constitutional issue when it is properly presented is still recognized as the Court's constitutional responsibility.¹⁸⁵

An unlimited sovereign immunity doctrine would contravene this constitutional duty. Unlike delaying techniques which only initially sort out issues between the state and federal courts,¹⁸⁶ an unlimited immunity doctrine completely cuts off adjudication in all federal courts. It is not surprising, therefore, that the Court has developed the *Larson-Dugan* exceptions to sovereign immunity, for at least the second exception regarding unconstitutional action is constitutionally required.¹⁸⁷ The Court cannot decline to exercise its article III jurisdiction to decide the claim of unconstitutional action.

The power and duty to hear constitutional questions also extends to relief, for the Court is obligated to give effective relief to vindicate the constitutional rights at issue. Where lower courts have rendered a form of relief that does not eliminate the constitutional wrong, the Supreme Court has consistently ordered¹⁸⁸ that more coercive measures be applied. For example, in *Turner v. Fouche*,¹⁸⁹ the plaintiffs had proved a statistical *prima facie* case of racial discrimination in juror selection, and the district court ordered the jury box refilled. When the new composition yielded statistics that

construction), and perhaps two, fall into the second category mentioned in the text. When in the second category of cases the Court cannot settle the parties' dispute by deciding the nonconstitutional issues, it must then consider the constitutional issue. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974).

¹⁸⁴ See Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16 (1964) ("The Brandeis rules are a far cry from the neo-Brandeisian fallacy that there is a general 'Power to Decline the Exercise of Jurisdiction Which Is Given,' that there is a general discretion not to adjudicate though statute, Constitution, and remedial law present a 'case' for decision and confer no discretion.")

¹⁸⁵ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 102 (1968).

¹⁸⁶ E.g., abstention, see *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); the Prentis doctrine, see *Prentis v. Atlanta Coast Line Co.*, 211 U.S. 210 (1908); comity principles in injunctions against state prosecution, see *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁸⁷ Even the first exception would also seem to be constitutionally required where the cause of action is based on federal law or where the authority challenged is set by federal law. See Gunther, *supra* note 184, at 16.

¹⁸⁸ See *Race Quotas*, *supra* note 6, at 141-46 (1973) (giving a history of the school desegregation cases).

¹⁸⁹ 396 U.S. 346 (1970).

would be sufficient to prove continuing discrimination, the plaintiffs asked for but were refused more specific relief. The Supreme Court reversed, stating that any relief that failed to end the discrimination would require further "corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees."¹⁹⁰

The Court, therefore, is constitutionally obligated not only to hear and determine the constitutional issues properly brought before it but is also under a collary duty to provide the relief necessary to redress the prevailing party's constitutional rights. Any refusal to provide relief, other than on the usual equitable grounds,¹⁹¹ must therefore arise out of the Court's appreciation that the power to take remedial action is constitutionally committed to another branch of government.

2. Executive and Congressional Powers

Notwithstanding the separation of powers, Congress and the executive typically act in concert, with the first formulating the laws and the second executing them. This interplay of presidential and congressional power was analyzed in Justice Jackson's concurring opinion in the *Steel Seizure Case*.¹⁹² The gist of Justice Jackson's argument is that the President's powers are derived from two sources, his own inherent constitutionally allotted powers and those powers conferred upon him by Congress in his capacity as the executor of the nation's general laws. Congress in turn has its own powers conferred by the Constitution. When exercised in the absence of inherent presidential power, these congressional powers properly direct and control the executive's actions.¹⁹³

Of course, in most instances Congress and the President work together in carrying out their constitutional roles.¹⁹⁴ This legislative-

¹⁹⁰ *Id.* at 359.

¹⁹¹ *See* p. 367 *infra*.

¹⁹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952). Equitable considerations which limited relief by referring to the parties' respective situations would not be considered self-limitations by the Court. *See* p. 363 *infra*.

¹⁹³ *See* 343 U.S. at 635-37.

¹⁹⁴ In the great majority of these situations, the executive branch acts in some administrative manner and that ends the matter. Presidential enforcement of congressional directives usually produces no involvement with the judiciary unless Congress has directed the President to use judicial process to enforce the law, *e.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965), or a private citizen seeks judicial process to insure that members of the executive branch enforce the law as Congress directed, *e.g.*, *Kendall v. United States*, 37 U.S., (12 Pet.) 524 (1838).

executive interplay may obscure the essential constitutional reality concerning the President's power: he often acts not from his own constitutional power as a decisionmaker but from the discretion and power that Congress has given him.¹⁹⁵ Indeed, an attack on the constitutionality of executive action in enforcing statutes always resolves itself into the question not whether the executive had constitutional power to act but whether Congress had such power.¹⁹⁶

The *Larson-Dugan* ultra vires exception to sovereign immunity thus preserves Congress' control over executive authority in the areas where the President's powers derive from his role as executor of Congress' laws. The ultra vires exception forbids the defendant official to claim immunity for actions that are outside the scope of the authority Congress has given him, thus effectively forcing the executive branch to conform its actions to Congress' legislated wishes.¹⁹⁷

Similarly, situations not covered by the *Larson-Dugan* exceptions may be seen as areas where the judiciary, lacking any article III interest of its own to assert,¹⁹⁸ defers to the joint power of

¹⁹⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-31 (1952) (Douglas, J., concurring); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930); *United States ex rel. Hall v. Payne*, 254 U.S. 343 (1920). Occasionally it is suggested that Congress gives too much discretion to the President. Compare *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), with *Yakus v. United States*, 321 U.S. 414 (1944).

¹⁹⁶ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Afroyim v. Rusk*, 387 U.S. 253 (1967); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring). But see *Powell v. McCormack*, 395 U.S. 486 (1969) (congressional employees).

The President has his own constitutional powers as well, U.S. CONST. art. II, § 2, chiefly relating to foreign relations and control of the armed forces. The powers explicitly granted are actually quite meager and often also require the consent of the Senate. But the explicit powers conferred have often served as the focal point for greater implied powers. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). The power implied may become so wide as to create friction with the powers of other branches of government. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968). This aspect of the President's inherent power will be considered at pp. 360-63 *infra* in the section dealing with sovereign immunity and relief.

¹⁹⁷ See *Houston v. Ormes*, 252 U.S. 469, 472-74 (1920); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) (injunction to control abuse of discretion granted; no sovereign immunity). The parallel between the mandamus and sovereign immunity doctrines is discussed exhaustively in *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot* 349 U.S. 909 (1955).

¹⁹⁸ See pp. 354-57 *supra*.

Congress and President. Thus applied, sovereign immunity protects the full range of federal lawmaking power from challenge as long as that power is exercised within constitutional bounds.¹⁹⁹ Even the Court's practice of strictly construing putative waivers of sovereign immunity ensures that it will play no role in this area except as prescribed by Congress.²⁰⁰

Seen in this light, the *Larson* Court's rejection of the "mere illegality" exception to sovereign immunity²⁰¹ becomes an important decision of constitutional law not unlike those rendered by a chastised Court after 1937. Cases such as *Wickard v. Filburn*²⁰² and *Steward Machine Co. v. Davis*²⁰³ marked the end of the Court's predilection for judging statutes by the Justices' own sense of a higher general law.²⁰⁴ Similarly, since the "mere illegality" exception was based on finding official violations of general tort law, rejection of that exception took the Court out of the business of finding "general law" and left it to Congress to decide what national policies should be pursued.²⁰⁵

The *Larson-Dugan* exceptions, therefore, operate at a level of analysis where the constitutional powers of the three branches of government are easily accommodated. The judiciary carries out its primary role of interpreting and applying the Constitution while deferring to congressional and executive power to make and apply general law, to exercise unreviewable lawmaking power in all the range of issues permitted by the Constitution. Furthermore, at this

¹⁹⁹ Since Congress' authority is defined by the Constitution, the only challenge to congressional authority can be on constitutional grounds. The judiciary has no power to inquire into Congress' discretionary decisionmaking. *Cf. Powell v. McCormack*, 395 U.S. 486 (1969).

²⁰⁰ See *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *cf. Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 222 (1945). See generally HART & WECHSLER, *supra* note 4, at 1351-56.

²⁰¹ See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 699-702. The exception had been employed earlier in *Goltra v. Weeks*, 271 U.S. 536 (1926).

²⁰² 317 U.S. 111 (1942).

²⁰³ 301 U.S. 548 (1937).

²⁰⁴ See *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). For a contemporary historical account of the Court's assumption of these general review powers, see Jacobson, *Federalism and Property Rights*, 15 N.Y.U.L.Q. REV. 319 (1938).

²⁰⁵ The Court's role in making general law is now interstitial, filling in gaps left in legislation, either by necessity or by congressional directive. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); HART & WECHSLER, *supra* note 4, at 762-69, 800-06, 830-32. In no manner does the Court displace congressional decisions in this area as it did before 1937.

general level the ultra vires exception to sovereign immunity also coordinates the roles between the executive and Congress, insuring that Congress' directives are obeyed when the executive strays from its authority, yet allowing full executive discretion when the executive is acting within its authority. The judiciary itself plays no role in the lawmaking and enforcement process except to the extent allowed by statute.²⁰⁶

B. Separation of Powers in the Relief Context

As seen above, the *Larson-Dugan* exceptions operate to confine each branch of government to its constitutional area of responsibility. In the relief context, however, the Supreme Court's power to decide constitutional issues and to provide relief can conflict with an equally explicit exclusive constitutional power of another branch to deal with the subject matter of the Court's proposed relief order. It is precisely such a conflict that is at the heart of the warning against affirmative relief in *Larson's* famous footnote eleven.

1. General Considerations

The *Larson* footnote cited a single authority,²⁰⁷ but it was only one of several old cases in which plaintiffs' requested relief would have compelled an officer to perform a *basic legislative function* such as levying a tax²⁰⁸ or appropriating government land to private parties.²⁰⁹ Indeed, the Court went so far as to divide land cases into two classes: those where the defendant officer claimed title without right and those where he claimed title by virtue of legislative act. Those cases seeking relief against the legislative act were held barred by sovereign immunity.²¹⁰

²⁰⁶ *E.g.*, in enforcing statutorily created causes of action, in creating federal common law when invited to do so by Congress or to flesh out Congressional policies. *See, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); note 55 *supra*. It should also be noted here that the accommodation of powers discussed in the text above is not an abstract and logical meshing of powers but rather a compromise worked out and accepted over time as a necessary consequence of the Court's assumption of the power of constitutional interpretation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁰⁷ 337 U.S. at 691 n.11, *citing* *North Carolina v. Temple*, 134 U.S. 22 (1890).

²⁰⁸ *E.g.*, *North Carolina v. Temple*, 134 U.S. 22 (1890).

²⁰⁹ *E.g.*, *Cunningham v. Macon & B.R.R.*, 109 U.S. 446 (1883); *see* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 713-15 (1949) (Frankfurter, J., dissenting).

²¹⁰ *See, e.g.*, *Noble v. Union R.L.R.R.*, 147 U.S. 165 (1893) (government claim to

The Court's unwillingness to infringe on legislative functions in the state context is evident in the Court's recent decision in *Edelman v. Jordan*.²¹¹ Allowing future relief could be justified on the theory that the legislature was free to decide whether to pay or discontinue a program; retroactive relief was barred because it left no decision to the legislature.²¹²

2. The Test

At the relief stage of litigation the court has before it a precise governmental action which the plaintiff wants undertaken, and the issue, under the separation of powers analysis, is whether the judiciary is the branch of government which may make that remedial decision or whether the Constitution commits the decision on that narrow issue to some other branch. More precisely, we noted above that in cases where the *Larson-Dugan* exceptions allowed it to act, the judiciary is performing its own constitutionally mandated function of interpreting and enforcing the Constitution.²¹³ The narrow question at the relief stage becomes whether that general power is negated by the Constitution's specific grant of authority to another branch to decide the issue raised in the proposed relief decree.²¹⁴

land based only on official's ultra vires act; railroad deemed to hold title by congressional authorization and relief giving it title granted); *Cunningham v. Macon & B.R.R.*, 109 U.S. 446 (1883) (state sovereign immunity context; relief denied where state by legislative act maintained title in land). For a modern example of a court trying to come to grips with the issue, compare the majority and dissenting opinions in *Simons v. Vinson*, 394 F.2d 732 (5th Cir. 1968) (suit to establish title in land).

The cases are collected in *Malone v. Bowdoin*, 369 U.S. 643, 646 nn.6, 7 (1962). *Malone* did not reach the question of relief since the plaintiffs failed to clear the initial hurdle of showing the *Larson-Dugan* exceptions to be applicable. *Id.* at 646-48.

²¹¹ 415 U.S. 651 (1974). See pp. 346-47 *supra*.

²¹² *Id.* at 666-69 and n.11. Of course, the state legislature in *Edelman* was not one of the three branches of the federal government. But the states are in a real sense situated, in relation to the Court's review power, no differently from the coordinate branches of the federal government. The Court has therefore adopted comity principles which give the same respect to state institutions as the Court would grant to the federal branches of government under a separation of powers analysis. See *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974).

²¹³ See pp. 353-60 *supra*. It was noted, moreover, that the exceptions work in such a manner that the court plays its role in constitutional interpretation while not interfering with the general power of the legislative and executive branches to make and enforce law at their discretion in all of the area allotted to the federal government by the Constitution.

²¹⁴ This is the inquiry adopted in *Baker v. Carr*, 369 U.S. 186 (1962), for deciding separation of power issues.

The inquiry therefore begins with the Constitution's text. Where power to decide the issue is explicitly conferred by the Constitution on another branch of government, as with the President's pardoning power,²¹⁵ that apparently ends the inquiry.²¹⁶ But, as we noted earlier,²¹⁷ the powers of each branch of government have been expanded through recognition of implied and inherent powers, and therefore the Court will be faced in most cases with the task of determining the scope of the power implied from the Constitution's text.²¹⁸ If the Court is unable to find the matter explicitly committed to another branch, it may employ a variety of inquiries into the strength of its own power, any lack of power being taken as a sign that the power to decide lies with another branch.²¹⁹

If one approaches the sovereign immunity issue from this perspective, it becomes immediately clear why treasury-opening decisions, such as that in *Edelman v. Jordan*,²²⁰ activate the immunity defense, while decrees like that in *Train v. City of New York*,²²¹ which ordered the release of impounded funds, do not bother the Court.²²² The separation of powers approach deals not with notions of "sovereign" powers but with the specific powers of the other branches of government. Payment from the treasury implicates the power of the legislative branch,²²³ which by specific constitutional mandate possesses the exclusive power to raise the money needed by

²¹⁵ See U.S. CONST. art. II, § 2.

²¹⁶ See, e.g., *ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

²¹⁷ See pp. 354-60 *supra*.

²¹⁸ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 518-48 (1969).

²¹⁹ See *id.* at 517-18, 548-49; *Baker v. Carr*, 369 U.S. 186, 211-26 (1962). The Court also asks, for example, whether the relief at issue is subject to "judicially manageable standards." *Id.* at 226. The lack of such standards might convince the Court that the issue, narrowly drawn, is constitutionally allotted to the Court as much as to another branch. Compare *Colegrove v. Green*, 328 U.S. 549 (1946) (guaranty clause puts reapportionment issue before Congress), with *Baker v. Carr*, *supra*, at 226 (judicially manageable standards under equal protection clause give power over same issue to the Court).

²²⁰ 415 U.S. 651 (1974). The Court has faced the same issue with regard to federal defendants. See *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945).

²²¹ 95 S. Ct. 839 (1975).

²²² The issue is raised at p. 352 *supra*, in connection with our criticism of the inductive logic test for judging whether relief would violate sovereign immunity.

²²³ Since the *Edelman* case deals with a state treasury, a separation of powers analysis does not technically apply. However, the same approach is employed under comity principles. See note 212 *supra*. For a federal sovereign immunity case

government and determine how it is to be spent.²²⁴ Since the power to pay out the nation's money rests with Congress, the Constitution, by its separation of powers, prevents the Court from ordering payments in cases such as *Edelman*. By the same reason the Court can order relief in cases such as *Train*, for there Congress has already exercised its constitutional power, having made the determination under article I that the money should be paid out for a specified purpose.²²⁵

The separation of powers approach to the sovereign immunity aspects of relief has one overarching benefit. Functionally it puts the court in the role it knows and which it has since *Marbury v. Madison* sought to play—that of interpreter of the Constitution. Avoided are such essentially political inquiries as whether relief would impose an intolerable burden on government.²²⁶ Certainly deciding if the Constitution allots power on a given issue exclusively to one branch or another is a difficult task;²²⁷ but it is essentially the same job that the Court undertakes whenever it decides the constitutionality of a statute or executive policy. As the Court recently reiterated in *United States v. Nixon*,

‘Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.’²²⁸

analogous to *Edelman*, see *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371 (1945).

²²⁴ U.S. CONST. art. I, § 7 (revenue bills originate in House), § 8 (power to lay and collect taxes, pay debts), § 9 (“No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . .”).

²²⁵ See *Train v. City of New York*, 95 S. Ct. 839, 843 (1975).

²²⁶ See pp. 348-51 *supra*.

²²⁷ This is especially true with the increasing assertion of “inherent,” *i.e.*, non-textual, constitutional powers. See *United States v. Nixon*, 418 U.S. 683, 703-07 (1974) (executive privilege); *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974) (asserted inherent executive power to control spending by a fiscally irresponsible Congress).

²²⁸ 418 U.S. at 704, quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962); cf. *Powell v. McCormack*, 395 U.S. 486, 520-21 (1969).

C. Employment Discrimination Relief: Applying the Separation of Powers Analysis

The separation of powers approach to deciding sovereign immunity aspects of relief may be illustrated by consideration of the federal employment discrimination problem. As was discussed in Section I of this Article, the *Larson-Dugan* exceptions apply to claims of unconstitutional discrimination in federal employment, thus allowing the suits to be heard on the merits.²²⁹ The question then arises as to what kind of relief is within the court's power, and the concern behind the question is possible interference with the executive branch's control over government employment affairs.²³⁰ The starting point is the separation of powers test: a constitutional violation having taken place, the courts have the power and are under the duty to remedy the violation *unless* such relief would impinge upon a substantive power allocated by the Constitution exclusively to the executive branch.²³¹

There are explicit presidential powers regarding the selection of a certain level of government employees, for example, judges and certain high officials.²³² With respect to executive officials, the power carries with it an inherent presidential power to discharge them at his pleasure.²³³ Even if the President or his advisors discriminate at this level, the Constitution might be read to assume that this cost is worth the benefits to executive effectiveness. Similarly, the President and his military officers might conclude that a war effort required discriminatory decisionmaking in armed forces promotion practices. That might be deemed within the President's power as Commander-in-Chief.²³⁴ Of course, we can only speculate here because the presidential power, not being explicitly conferred by the Con-

²²⁹ See p. 343 *supra*.

²³⁰ See p. 347-48 *supra*. Relief involving back pay would come within the examples of congressional power of the purse discussed above. See pp. 362-63 *supra*. Since there is an adequate remedy at law for the back pay claim, see *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971), Congress' having waived its sovereign immunity interest in controlling the nation's purse, see *id.* and 28 U.S.C. § 1346(a)(2) (1970), the only remaining issue to be examined is that of injunctive relief.

²³¹ See pp. 361-62 *supra*.

²³² U.S. CONST. art. II, § 2. Senate approval is required.

²³³ See *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958).

²³⁴ U.S. CONST. art. II, § 2; see *Korematsu v. United States*, 323 U.S. 214 (1944). Cf. *Ballard v. Schlesinger*, 95 S. Ct. 572 (1975).

stitution, would have to be delineated on a case by case inquiry into the scope of the President's implied powers.²³⁵

Whatever the extent of the implied presidential power with regard to tenure of higher level officials, it seems clear that it could not reach down to cover the general run of government employees. The constitutional text extends the power of appointment only down to "inferior officers" and that power itself comes to the President only as directed by Congress.²³⁶ Thus, it appears that the power to control the employment of even inferior officers is more in line with the concept of the President's role as executor of Congress' directives, rather than any exclusive power of his own.²³⁷ Moreover, even granting an inherent power, it would take a strained interpretation to bring all federal employees within the scope of the term "inferior officers."²³⁸

The refusal to recognize such inherent presidential power over federal employee tenure also accords with both our traditional and recent practices concerning suits by federal employees. Traditionally the Court shied away from involvement in employee suits, but it founded its reluctance on equitable grounds because there was an adequate post-removal remedy at law.²³⁹ In recent years both the courts²⁴⁰ and Congress²⁴¹ have limited the executive's control over the general mass of government employees. Indeed, the Court's most recent pronouncement on this issue in *Sampson v. Murray*,²⁴² while refusing to grant interim relief in most circumstances, nevertheless maintains the Court's shared power with Congress and the executive to act in employee suits.²⁴³

²³⁵ See, e.g., cases cited in note 233 *supra*; *Baker v. Carr*, 369 U.S. 186, 210-26 (1962).

²³⁶ U.S. CONST. art. II, § 2.

²³⁷ See pp. 357-58 *supra*.

²³⁸ Cf. *Morrow v. Crisler*, 491 F.2d 1053, 1061 (5th Cir. 1974) (dissenting opinion) (arguing, without success, that state troopers are "officers," rather than "employees," of the state).

²³⁹ See, e.g., *White v. Berry*, 171 U.S. 366 (1898). The more extreme reluctance of earlier cases appears to derive from the elementary nature of statutory standards for testing the legality of executive dismissal of employees. See *Keim v. United States*, 177 U.S. 290, 293-94 (1900) (arguing that "in the absence of statutory regulation," the President must be allowed discretion, else the employee is effectively tenured for life). In *Sampson v. Murray*, 415 U.S. 61, 72 (1974), the *White* line of cases was read only for the narrow proposition that "interim injunction relief" could not be granted to control employee discharges.

²⁴⁰ See, e.g., *Service v. Dulles*, 354 U.S. 363 (1957).

²⁴¹ See *Sampson v. Murray*, 415 U.S. 61, 78-83 (1974) (describing the "broad regulatory" structure Congress has created in the area of employee rights).

²⁴² 415 U.S. 61 (1974).

²⁴³ *Id.* at 92 n.68. Of course, were we to consider the power to discharge employees

Moreover, in personnel matters any claimed right to discriminate runs counter to statutorily declared national policy²⁴⁴ and executive orders issued by the President that forbid unconstitutional discrimination in federal employment.²⁴⁵ Any assertion that the executive branch needs to control all underlings to insure that the laws are faithfully executed is necessarily limited by these declarations. Thus, discrimination by lower federal supervisory personnel cannot be considered as an implementation of presidential policy or power.²⁴⁶

Nor can it be accepted that employee complaints are unsuited to judicial resolution and thereby inferentially within the power of some other branch.²⁴⁷ Just as the Court found its equal protection standards applicable in reapportionment suits,²⁴⁸ they are also applicable in employment cases.²⁴⁹ Indeed, the judiciary's vast experience with employment cases insures its competence in these matters.²⁵⁰

In sum, then, injunctive relief in an employment discrimination case cannot be seen as trenching on the exclusive domain of another branch of government and thus should not be barred by sovereign immunity principles. Although this analysis leaves little room for governmental officials to shield their discriminatory personnel decisions, it should be emphasized that a court would only order such relief as would be constitutionally necessary.²⁵¹ Consequently, in

to be an inherent, exclusive executive power, then even congressional legislation would be an intrusion upon that power and would therefore be unconstitutional. *See Myers v. United States*, 272 U.S. 52 (1926). In practice we have usually assumed that the government needed congressional authority to justify executive regulations governing employee rights. *See, e.g.*, 5 U.S.C. §§ 7101, 7151-54, 7301, 7311, 7321 (1970).

²⁴⁴ 5 U.S.C. § 7151 (1970).

²⁴⁵ *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), *superseded in part by* Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969).

²⁴⁶ *See Service v. Dulles*, 354 U.S. 363 (1957).

²⁴⁷ *See* p. 262 and n.219 *supra*.

²⁴⁸ *See Baker v. Carr*, 369 U.S. 186, 226-37 (1962).

²⁴⁹ *Cf. Ballard v. Schlesinger*, 95 S. Ct. 572 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

²⁵⁰ The cases decided under 42 U.S.C. § 2000e (Supp. III, 1973) and other statutes are too numerous to mention here. For a sampling see cases noted in 42 U.S.C.A. at 277-521 (1974). There is no reason to believe that the mastery of problem solving techniques built up in this area cannot also be used in handling suits against federal officials. *Cf.* 42 U.S.C. § 2000e-16(d) (Supp. III, 1973) (adopting same standards for judicial decision in suits against federal officials as previously applied to private employers).

²⁵¹ *See* p. 266 *supra*.

most situations such long-accepted remedies as reinstatement or prohibitory relief might prove acceptable in ending the discrimination.²⁵² Moreover, whatever interest the executive branch has in running its own affairs would be vindicated through the application of usual equity principles.²⁵³

CONCLUSION

The reluctance of several federal courts to entertain federal employee discrimination suits has led us to a general reexamination of the doctrine on which the decisions were based—sovereign immunity. Inherited from the English legal system, the doctrine has survived, I suggest, because in its revised American formulation it serves to maintain the separate constitutional powers of the three branches of our federal government.

At one level of application the doctrine's rules are firmly established, the Supreme Court having long recognized two exceptions to sovereign immunity that in effect comprise the doctrine. These exceptions, which the deviant federal employment discrimination cases failed to follow, permit suits to be heard against federal officials who have acted outside their statutory authority or in an unconstitutional manner. Therefore, as later circuit court decisions have held, suits alleging unconstitutional employment practices by federal officials deserve a hearing on the merits.

Even though a case may be heard on the merits, relief may also raise sovereign immunity problems. At the relief phase of litigation, the Supreme Court has established no firm rules similar to the two exceptions applied at the pleading stage of the suit. While claims for money from the treasury or for title to public land are certain to raise problems, it is unclear why such relief should be banned under the rubric of sovereign immunity, and, accordingly, one can never be quite certain what relief other than land and treasury claims would

²⁵² *Cf. Perkins v. Elg*, 307 U.S. 325 (1939). Only in cases where discrimination was proved throughout a department or agency would more coercive relief be required. The guiding standard for the court would be whether it could expect the defendant officials to remedy their constitutional wrongs from their own affirmative action. *See Race Quotas*, *supra* note 6, at 172.

²⁵³ *E.g.*, mootness, *see Liner v. Jafco*, 375 U.S. 301 (1964); *but see Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911); existence of an adequate remedy at law, *see Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971). One commentator has argued that these traditional devices are completely adequate to keep in bounds any feared flood of litigation. Block, *supra* note 35, at 1081-85.

be similarly barred. This Article has argued that separation of powers notions underlie the Court's actions concerning relief, thus suggesting a method of analysis that can give more objective content to the term "sovereign immunity" at the relief stage of litigation.

Applying the separation of powers approach involves the courts in a task they know well—constitutional interpretation, for the courts must ask whether the relief they have been asked to grant would invade powers committed exclusively to another branch of government. In suits charging federal employment discrimination, very few, if any, forms of injunctive relief would be forbidden because the Constitution commits few powers to the President in this regard.